Supreme Court, U.S.
FILED

NO. 96 1554 MAR 27 1997

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In the Supreme Court of the United States

OCTOBER TERM, 1996

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE, MILDRED V. BAECKE, ET AL

Petitioners

v.

THE UNITED STATES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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41PP

QUESTIONS PRESENTED FOR REVIEW

This application for writ of certiorari presents the following issues for review:

1. Whether 28 U.S.C. §1500 prohibits jurisdiction in the Court of Federal Claims because of the pendency of the same claim against the City of San Antonio.

2. Whether the government's pleadings and claims of prior takings of easements invoke the Quiet Title Act, 28 U.S.C. § 2409a and the 12-year statute of limitations therein.

3. Whether this cause should be dismissed or remanded to the District Court.

4. Whether the sole limitations defense available to the United States is its prior perfection, over a period of 10 years, of a permanent prescriptive avigation easement under Texas easement and inverse condemnation law.

5. Whether the physical and regulatory takings were "progressive" so as to defer the accrual of landowners' cause of action.

6. Whether the trial court may disregard or disbelieve official findings of noise contours and low flights supplied by and admitted by the government.

7. Whether invidiously discriminatory land use regulations procured by the Air Force from local authorities in accordance with a mandatory federal regulation requiring such procural only as to military Accident Potential Zones are attributable to the United States.

PARTIES TO THE PROCEEDING

All Plaintiffs-Petitioners are owners of the tracts of land shown on Figures 1 and 2, infra., and are listed herein:

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN, GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, A.C. LOPEZ, MARGARET G. BROWN, HELAMAN R. DURAN, IRENE L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA,

PARTIES TO THE PROCEEDING (continued)

CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of Est. of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd, Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES SALDANA, CARMEN GARCIA and ROLAND NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR., Ind. Exec. of Est. of J.L. GUERRA, SR. Dec'd.,

Pursuant to Supreme Court Rule 29.6, 4M Properties, Inc., a Texas corporation, states that it has no parent corporations or subsidiaries.

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OPINIONS BELOW

At the time of transfer from District Court, appeal was taken. *Persyn v. United States,* 935 F.2d 69 (5th Cir. 1991).

Orders have also been reported in this case relative to partial summary judgment, *Persyn v. United States,* 33 Fed.Cl. 579 (1995) (Appendix ["App."] B), and dismissal on the merits, *Persyn v. United States,* 34 Fed.Cl. 187 (1995) (App. C).

The opinion of the Federal Circuit was unreported. Affirmance was noted. *Persyn v. United States,* 106 F.3d 424 (Fed.Cir. 1996) (App. D).

STATEMENT OF JURISDICTION

This is a case initially brought in 1988-89 in the United States District Court for the Western District of Texas under 28 U.S.C. §1346 and §1491 against the United States for a physical taking by overflight in which both the United States and the City of San Antonio ("City") were jointly and severally sued for parallel and concurrent physical and regulatory takings. Over Petitioners' objection, the District Court dismissed the City and transferred the claims against the United States to the Court of Federal Claims. If the Court of Federal Claims has jurisdiction, it is conferred by 28 U.S.C. §1491. Upon appeal to the United States Court of Appeals for the Fifth Circuit, *Persyn v. United States,* 935 F.2d 69 (1991), the Court held that it had no appellate jurisdiction because the order dismissing the City lacked finality. Because of the continuing pendency of the claim against the City, 28 U.S.C. §1500 prohibits the vesting of jurisdiction in the Court of Federal Claims. If it is determined that the Court of Federal Claims had subject matter jurisdiction, the Court of Appeals had jurisdiction to review its orders pursuant to 28 U.S.C. §1295(a)(3).

Under 28 U.S.C. § 1254(1), Petitioners seek review of

the opinion of the United States Court of Appeals for the Federal Circuit and its judgment of December 27, 1996. That judgment affirmed the lower court's grant of partial summary judgment and dismissal on the merits.

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES:

(In Order of Citation In Remainder of Brief)

32 CFR, Part 256 (Air Installation Compatable Use Zones) (App. F)
24 CFR, Part 51, Subpart B (Environmental Criteria) (p. 4 infra)
24 CFR, Part 51, Subpart D (Accident Potential Zones) (App. G)
28 U.S.C. § 1500 (Jurisdiction, Court of Federal Claims) (App. E)
28 U.S.C. § 2409a *et. seq.* (Quiet Title Act), (Point ID, infra)
28 U.S.C. § 1346(f) (Jurisdiction, District Court) (App. H)
28 U.S.C. § 1652 (Rules of Decision Act) (App. I)
U.S. Const. Amend. 5 (Takings Clause) (App. J)

STATEMENT OF THE CASE

Petitioners own 35 tracts of land in the approaches to Kelly Air Force Base, Texas (KAFB). These approaches are termed by the Air Force "Accident Potential Zones" ("APZ's"). Claimants' real estate served runways 15-33 and 14-32 in FYs 1972-73. The tracts to the north of runway 15-33 of KAFB are depicted in *Figure 1,* infra. Those to the south are shown in *Figure 2,* infra. (Large scale ownership maps of the APZ's are in evidence as PX 1 and 2).

Prior to 1975, the only evidence presented as to prior takings is in the government's responses to discovery. (PX 106). Evidence of the gross number of flights in 1966 also appeared (Transcript ["Trans."] 561).

In May 1975, the Air Force published an *Air Installation*

Figure 1
AP2's (North)

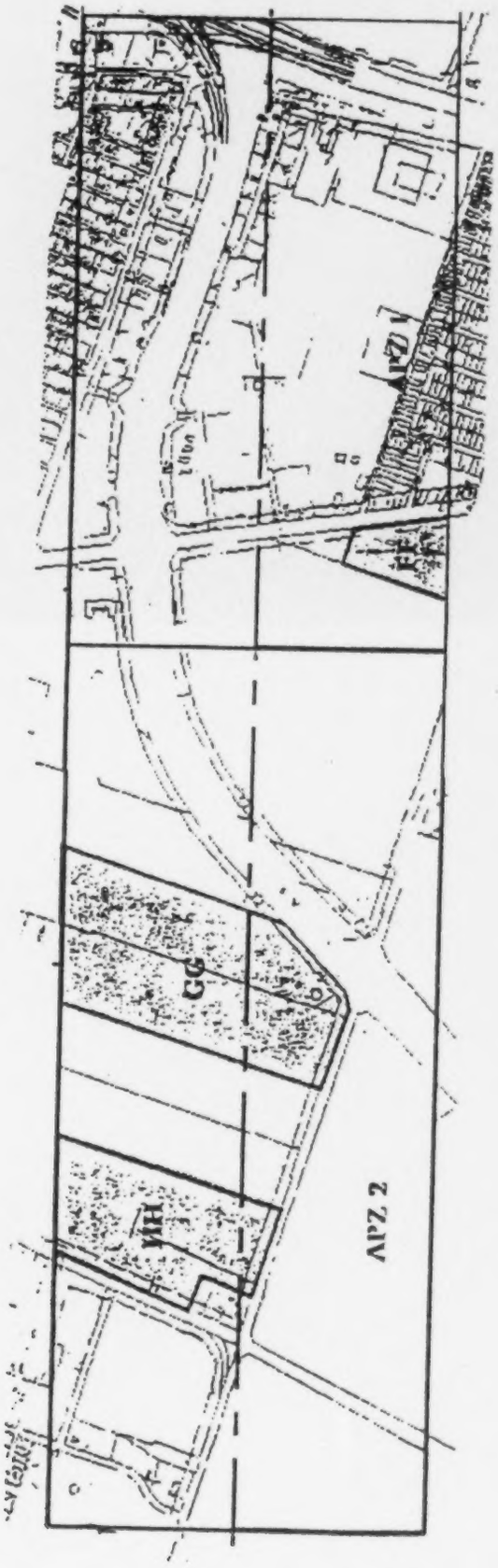
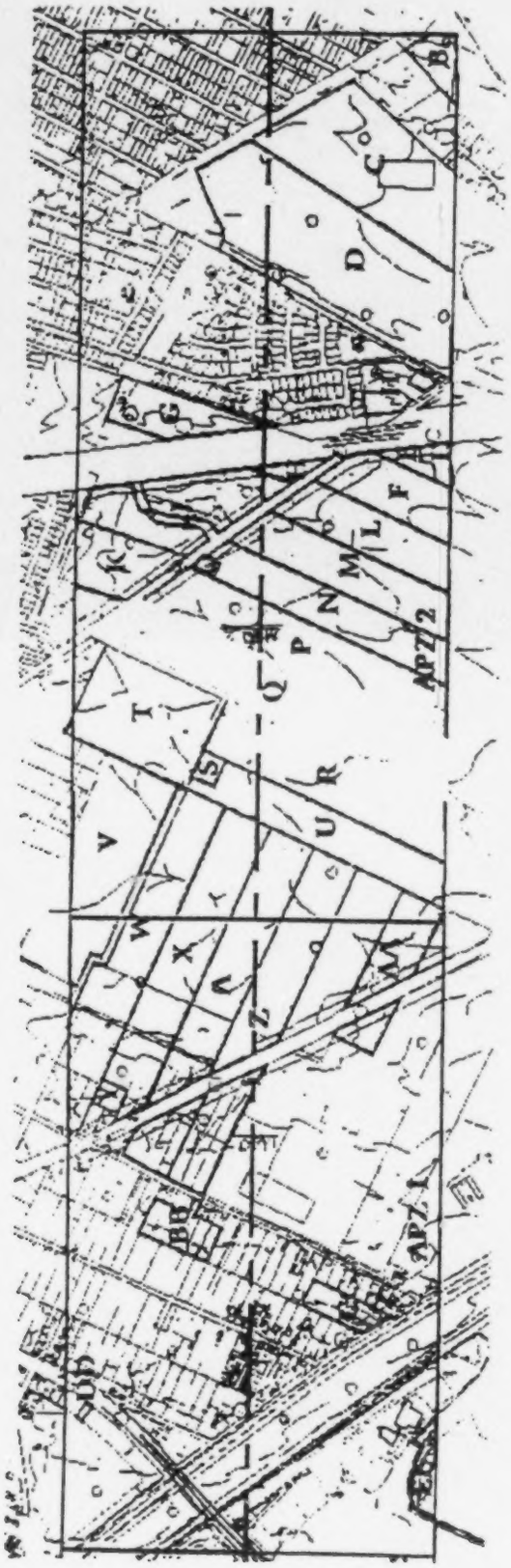


Figure 2
AP2's (South)



Compatable Use Zone Study (AICUZ) (PX 72), based on data gathered in FYs 1972-73. Decibel contours (measured in "Day/Night Average Sound Level [Mathematical]," or "Ldn,") were determined and mapped at 65, 70, 75 and 80+ Ldn. For purposes of comparison, the 65 Ldn area for FYs 1972-73 will be quantified as 100%. The AICUZ study took into account two factors: noise and accident potential hazard. *Figure 3,* infra (PX 72, PX 98), shows noise contours from that study. With one exception, all of Plaintiffs' land was within the 60 to 75 Ldn contours. (PX 98). These contours were of public record in the FHA office in San Antonio (PX 112, Trans. 191-193).

It will be noted that from FY 1955 through FY 1985, there were two active runways at KAFB, 14-32 and 15-33 (PX 72, PX 98).

The APZ's for runway 15-33, previously limited by the 65 Ldn contour were expanded by Department of Defense ("DOD") regulation 32 CFR, Part 256 "Air Installation Compatable Use Zones" in 1977. The expanded APZ's are shown on *Figure 4,* infra (PX 8, PX 98).

The government claims a regulatory taking of a hazard easement by the promulgation of this regulation. (PX 106, Trans. 224-225).

On July 12, 1979, the United States Department of Housing and Urban Development ("HUD") promulgated 24 CFR, Part 51 § 51.103. For purposes of community block grants of appropriated funds and the financing of new residential construction, the following standards were adopted (measured in Ldn):

SITE ACCEPTABILITY STANDARDS (Footnotes omitted)

Day-night average sound level (in decibels)	Special approvals and requirements

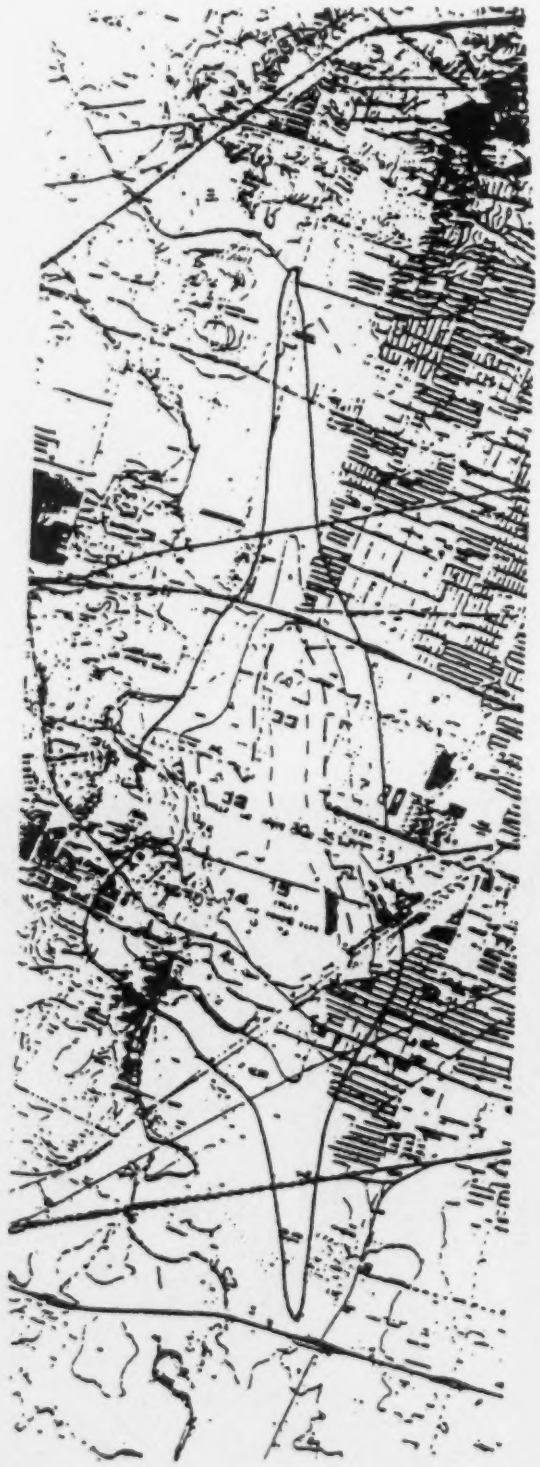


Figure 3
1975 AICUZ Study Sound Contours

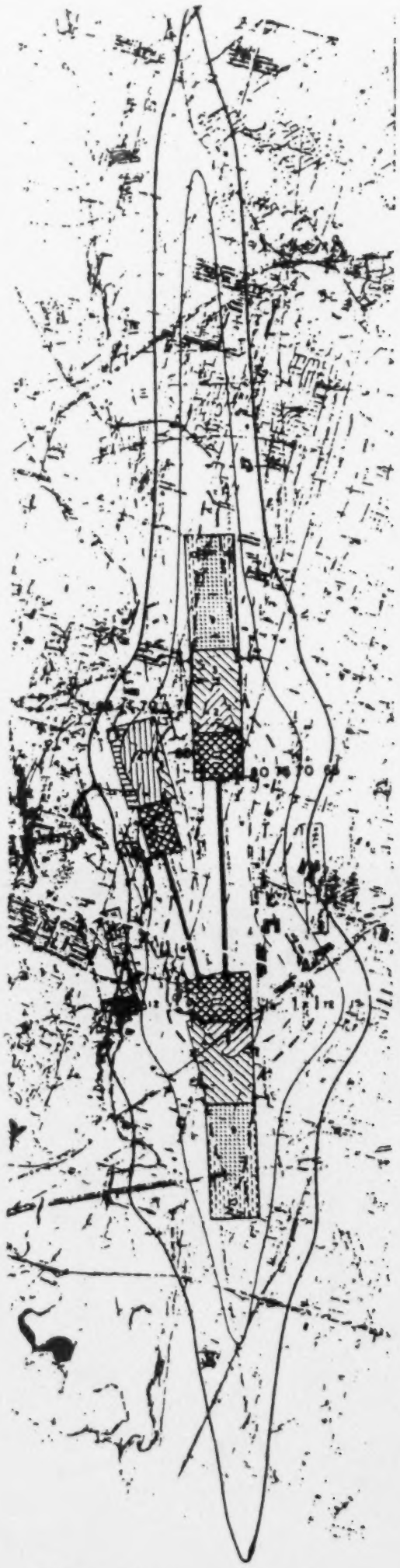


Figure 4
1981 AICUZ Study Sound Contours

Acceptable	-Not exceeding 65 db	-None
Normally Unacceptable	-Above 65 but not exceeding 75 db	-Special Approvals -Environmental Review -Attenuation
Unacceptable	-Above 75 db	-Special Approvals -Environmental Review -Attenuation

According to the AICUZ study published by the Air Force in November 1981 using FY 1979 data, the 65 Ldn area had increased by 185%, or to 285% of the 1975 level (PX 8). As noted, "With the arrival of F-4 Fighter aircraft, the 65-70 Ldn noise level was extended 5.2 miles northward through Leon Valley city limits and 3.2 miles southwest into Bexar County." The sound contours mapped in the 1981 study are shown on *Figure 4*, supra (PX 98).

The Environmental Protection Agency and the Departments of Transportation, HUD and DOD established and published uniform "*Guidelines for Considering Noise And Land Use, Planning And Control*" (Gov. Printing Off. 1980). They made the following findings:

NOISE ZONE CLASSIFICATION

Noise Zone	Noise Exposure Class	*Noise Descriptor* DNL Day-Night Average Sound Level	HUD Noise Standards
A	Minimal Exposure	Not Exceeding 55	"Acceptable"
B	Moderate Exposure	Above 55 but Not Exceeding 65	

		Above 65	
C-1		Not Exceeding 70	
——	Significant	——————	"Normally
	Exposure		Unacceptable
C-2		Above 70 but	
		Not Exceeding 75	
		Above 75 but	
D-1		Not Exceeding 80	
	Severe	Above 80 but	
D-2	Exposure	Not Exceeding 85	"Unaccceptable"
D-3		Above 85	

Another AICUZ study was carried out for FY 1983. It once again showed significant expansion of noise levels (PX 113 c & d).

HUD published a new regulation, 24 CFR, Part D, dated January 6, 1984 (App. G). The regulation is applicable to the clear zones of civilian airports and to the clear zones *and* APZ's of military airfields. It is *not* applicable to the approaches to civilian airports.

Section 51.303 adopted the provisions of the DOD AICUZ regulation 24 CFR, Part 51, *supra.* The HUD regulation imposes severe restrictions upon all types of federally funded, assisted or insured development and limits usages to those specified by the DOD regulation.

An "Environmental Assessment For Proposed Mission Changes at Kelly Air Force Base, Texas," dated January 1984 evaluated the future basing at KAFB of C5A aircraft, a much larger and noisier jet transport replacing the C-130 turboprop transport (DX 5). Projected sound-contours for FY 1985, reflecting the C5A activation are shown in *Figures 5 and 6,* infra (PX 113e and 113f). These official Air Force findings were furnished to Plaintiffs by Defendant as discovery and were admitted into evidence. (Trans. 249)

After the C5A stationing, contour level 80 covered the majority of Plaintiffs' land. Contour levels 75-80 covered the remainder, except for a small sliver of land in the northeast corner of APZ 2 (North).

As scheduled, the stationing of C5A jet transports at KAFB began in 1984. Plaintiff Clotilde Persyn (Parcel A) testified that the aircraft has a unique ". . .whine and it goes clean through you (Trans. 107-108)." It was impossible to carry on normal telephone conversations. Television listening was impaired. Its landing lights ". . .lights up your bedroom at night. Sleeping at night is difficult (Trans. 106-107)."

Plaintiff Amadeo Lopez (Parcel BB) stated that the flights were so low that he ". . .could see the nuts and bolts on it right overhead." His elderly mother was adversely affected, "She cries, sir. She cried." Personal or telephone conversation was impossible (Trans. 62-66).

"I live under the aircraft and C-5A emits, puts out, a loud whine and its very deafening to my ears. . ." was the testimony of Patricia Verstuyft (Parcel S). Her land was not suitable for human habitation (Trans. 266).

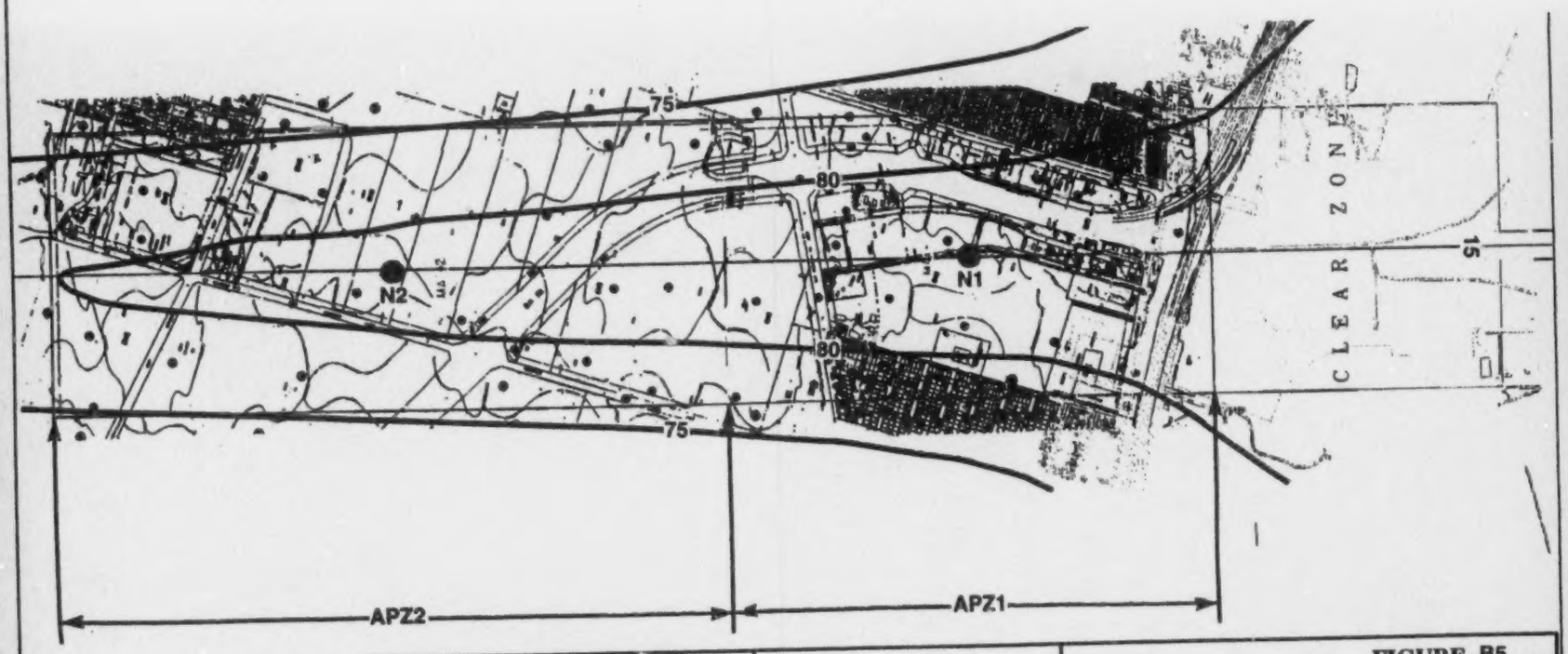
Aircraft on instrument landing enter APZ 2 (South) at 786.12' above ground level (AGL) (3° glide slope), enter APZ 1 (South) at 419.26' AGL and leave APZ 1 (South) at 157.22' AGL. (PX 8, PX 105, Trans. 456-458). Those approaching from the north (2-1/2° glide slope) fly at lower levels.

The element of interference with surface usage need not be further detailed from the testimony of the Plaintiffs. The trial court itself stated in that respect all that needs to be said (Trans. 566):

> The court does believe that without significant noise abatement, much of plaintiffs' properties are virtully uninhabitable.

AIRCRAFT NOISE EXPOSURE KELLY AFB	SCALE IN FEET 0 1000 2000 N	FIGURE B6
DATE: October 1993		Ldn CONTOURS PREPARED BY AIR FORCE AICUZ UNIT - 1985 SOUTH OF RUNWAY 15/33

Figure 5



AIRCRAFT NOISE EXPOSURE KELLY AFB	SCALE IN FEET 0 1000 2000 N	FIGURE B5
DATE: October 1993		Ldn CONTOURS PREPARED BY AIR FORCE AICUZ UNIT - 1985 NORTH OF RUNWAY 15/33

Figure 6

Runway 14-32 was closed in 1985 (Trans. 463-464). All traffic was diverted onto runway 15-33 which undoubtedly contributed to the exceptionally high levels of noise to prevail in that year.

Between 1984 and 1986, the Air Force conducted a well-publicized campaign to alert the public to the menance of noise and crash hazards in the APZ's (Trans. 116-124, 163-168). It was stipulated that "these meetings did occur, that the AICUZ studies were handed out, and that the Air Force did what it was supposed to do, which was make people aware, publicize the fact that it was going to happen. . . and there was newspaper and television coverage of the events." (Trans. 166-168). Approximately 22 such meetings occurred (Trans. 267).

In granting summary judgment that municipal land use regulations cannot be imputed to the United States, the trial court noted (App. 7):

> In August 1985 the Air Force presented the Mayor, the City Planner, the City Manager and the City Attorney of San Antonio with a formal briefing on the AICUZ study. The Mayor subsequently held public hearings on the Air Force's recommended zoning. The Air Force attended these hearings and recommended that zoning should be changed to conform to the AICUZ concept. On April 17, 1986, the City passsed a zoning ordinance that conformed with AICUZ restrictions, although it did not contain recommended noise attenuation measures.

As this is a bifurcated trial, damages to each tract were to be established in a subsequent hearing. All that Plaintiffs had to prove at this phase was that as a consequence of Defendant's permanent physical intrusions, each of Plaintiffs' tracts sustained some damage. Testimony to that effect is in the record (Trans. 283-285).

From 1987 through 1995, with the exception of the

transfer of land with pre-existing structures, there were no sales of land in the 2.5 square miles within the APZ's. This is quite remarkable for such a large body of land completely within the San Antonio city limits. The market was completely frozen, or, as one witness put it, "dead as a doornail." (Trans. 288).

Like a frost-bitten extremity, the extent of damage could not be fully ascertained until thawed. Two land sales did finally occur in 1995 within the far north and south ends of the APZ's. When paired with pre-taking sales of the same land, a dramatic loss of value is obvious:

A. In 1984, parcel HH, owned by Plaintiffs Cadena and Miller, was under valid contract of sale with earnest money to the Mexican American Unity Council (MAUC) for $1.50 per square foot or $65,340 per acre. In October 1985, because of the expenses of soundproofing and the legal and political turmoil over the APZ's, MAUC declined to consumate the transaction, as was its right (Trans. 348-352). The land was foreclosed. It last sold for $6,004.00 per acre in 1995, a loss in value of 90.7% (Trans. 406). If adjusted for the period of its dormancy to a 1986 value at 6% per annum, the 1986 value is $3,554.00 per acre or a loss of 94.4%.

B. In 1984, Parcel D was purchased by Plaintiff Raul Jimenez, Sr. for $7,273.00 per acre. It, too, was forclosed. The same tract sold in January 1995 for $1,200.00 per acre, a loss of 83.5%. (Trans. 395-396). If adjusted for the period of its dormancy to a 1986 value at 6% per annum, the 1986 value is $710.00 per acre or a loss of 90.2%.

Since 1986, four of Plaintiffs' 35 parcels have been foreclosed. Of the remaining 31, 12 have passed by devise or descent. Short of foreclosure, death, donation, or sale at donative prices there is no manner in which the landowners can rid themselves of this worthless real estate.

Other facts will be set forth in the Points to which they

relate.

REASONS FOR GRANTING THE WRIT

I.

BECAUSE OF THE PENDENCY IN THE DISTRICT COURT OF AN ACTION AGAINST A CO-CONDEMNOR, THE CITY OF SAN ANTONIO, THE COURT OF FEDERAL CLAIMS DID NOT ACQUIRE SUBJECT MATTER JURISDICTION; A REMAND TO DISTRICT COURT IS REQUIRED:

A. PLAINTIFFS' INDIVISIBLE CAUSE OF ACTION IN THE DISTRICT COURT WAS AGAINST THE UNITED STATES AND THE CITY FOR A JOINT TAKING FOR WHICH BOTH CONDEMNORS ARE LIABLE.

B. THE PROHIBITION OF 28 U.S.C. §1500 APPLIES WHEN PLAINTIFFS PLEAD THAT CITY WAS "ACTING. . .UNDER THE AUTHORITY OF THE UNITED STATES. . ."

C. JURISDICTION OVER THE CITY WAS RETAINED IN THE DISTRICT COURT AND NOW PENDS IN THE FIFTH CIRCUIT.

D. THE DISTRICT COURT HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ALLEGED PRIOR TAKINGS BY THE UNITED STATES UNDER 28 U.S.C. §2409a *ET. SEQ.* AND 28 U.S.C. § 1346(f).

An understanding of the substantive law of prescriptive easements and of progressive takings is essential to determination of jurisdictional questions. Points II and III are thus incorporated herein by reference.

A. PLAINTIFFS' INDIVISIBLE CAUSE OF

ACTION IN THE DISTRICT COURT WAS AGAINST THE UNITED STATES AND THE CITY FOR A JOINT TAKING FOR WHICH BOTH CONDEMNORS ARE LIABLE.

Erroneously, the trial court and Federal Circuit overlooked the Fifth Circuit's prior adjudication that the landowners' cause of action for a joint taking by the United States and the City of San Antonio is a single cause of action which cannot be arbitrarily split into federal and municipal components. In *Persyn v. United States,* 935 F.2d 69 (5th Cir. 1991) it held:

> For safety purposes, San Antonio requires clear zones 3000 feet in length and width at the ends of military airport runways located within its jurisdiction. In 1986, the Air Force requested the establishment of two military supplementary overlay zoning districts around Kelly Air Force Base as an additional safety precaution. The City passed Ordinance 62739-A creating these special districts extending beyond the existing 3000 feet clear zones. Zone 1 extended 5000 feet beyond the clear zone and Zone 2 extended 7000 feet beyond Zone 1, San Antonio, Tex. Code, § 35-222 (April 17, 1986). The ordinance imposed restrictions on the use of all land located within the overlay districts. Two additional ordinances passed during the next year, 64225 and 64961, refined and amended the use restrictions. The ordinances and their ultimate effect on property values near the base are the *basis for a portion of the landowners' claims of a taking of their property.* (935 F.2d 70-71). . .
>
> The dismissal is also not appealable under the collateral order doctrine. *Although the order finally disposes of the landowners' claims against the City, the issue involved is not separate from the claims against the United States.* (Citing authorities) (Emphasis added 935 F.2d 74).

Defendant did not file a petition for certiorari in the United States Supreme Court.

B. THE PROHIBITION OF 28 U.S.C. §1500 APPLIES WHEN PLAINTIFFS PLEAD THAT CITY WAS "ACTING. . .UNDER THE AUTHORITY OF THE UNITED STATES. . ."

In the District Court, Plaintiffs alleged in their First Amended Complaint, p. 3:

> 11. At all times relevant hereto, the United States was acting by and through the City and the City was acting directly or indirectly under the authority of the United States and for the sole and exclusive benefit of the United States.

There is no jurisdiction by Petitioners' consent. Both the landowners and the government have consistently asserted the absence of jurisdiction because of 28 U.S.C. §1500. Landowners timely moved for remand under that section.

The trial court states that "In July 1992, Plaintiffs filed their first amended complaint . . .specifically invoking the jurisdiction of this court (App. 2)" As the Court of Federal Claims record reveals, quite the opposite is true (First Amended Complaint, 2-3):

Plea to the Jurisdiction

> 1. The United States District Court for the Western District of Texas has subject matter jurisdiction over this case under the statues of the United States, including 29 U.S.C. §1331. . .
>
> 5. Within the meaning of 28 U.S.C. § 1500, Plaintiffs have pending in the United States District Court for the Western District of Texas claims against

the City of San Antonio, Texas, which municipality was "acting or professing to act, directly or indirectly under the authority of the United States" relative to the matters alleged herein.

Alternative Jurisdiction of Claims Court

6. Subject to Landowners' Plea to the Jurisdiction above stated and the overruling thereof by this Court, Landowners state, in the alternative, the jurisdiction of the Claims Court under the provisions of 28 U.S.C. § 1491 (a)(1) et seq.

To which the government duly replied in its "Answer to First Amended Complaint" (p. 1):

Defendant United States answers the complaint of plaintiffs as follows.

1. The allegations of paragraph 1 are denied...

5. The allegations of paragraph 5 are admitted.

6. The allegations of paragraph 6 are conclusions of law to which no response is required. *To the extent an answer is required, the allegations of paragraph 6 are denied.* (Emphasis added).

The applicability of §1500 is determined by the parties' pleadings, *Dico Inc. v. United States,* 48 F.3d 1199, 1203-4 (Fed. Cir. 1995).

C. JURISDICTION OVER THE CITY WAS RETAINED IN THE DISTRICT COURT AND IS NOW PENDING IN THE FIFTH CIRCUIT.

The trial court's conclusion that the attempted dismissal of the City was a "final order" permitting the vesting of jurisdiction in the Court of Federal Claims (App.

3-4) is diametrically contrary to the Fifth Circuit's adjudication in *Persyn, supra.*

Conclusion

> We do not have appellate jurisdiction to review the district court's order transferring the landowners' claims against the United States to the Claims Court. The appeal of the court's order dismissing the claims against the City of San Antonio is premature. The appeal from the latter order must await the decision of the Court of Claims involving the asserted right to a remand to the district court of the claim against the United States. Accordingly, we dismiss the landowners' appeal of the two orders of the district court. (935 F. 2d 74-75).

No authority was cited, nor can any be cited, for the trial court's reasoning "... Although the district court's order transferring the case and dismissing the city was non-final for appeal purposes, the claim against the city did not remain behind like so much lost luggage in the district court.' (App. 4)

If the claim against the City did not "remain behind," where did it go?

The answer is that the joint claim against the City was pending in the District Court until January 24, 1997. On that date, notice of appeal was given. The claim now has been docketed and pends as cause No. 97-50108, *Persyn v. United States,* in the United States Court of Appeals for the Fifth Circuit.

D. THE DISTRICT COURT HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ALLEGED PRIOR TAKINGS BY THE UNITED STATES UNDER 28 U.S.C. 2409a *ET SEQ.* AND 28 U.S.C. 1346(f).

As is apparent from the previous point, the Court of Federal Claims is without jurisdiction. The question then arises: Should this cause be dismissed or remanded?

From the pleadings, discovery and evidence, there is another separate and distinct reason why it must be remanded. By claiming the prior taking of avigation easements in Petitioners' realty, the government has raised questions of law and fact within the exclusive original jurisdiction of the District Court under the provisions of the "Quiet Title Act," 28 U.S.C. § 2409a, *et seq.*

The statute, enacted by Congress in 1972, provides, in relevant part:

> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possesssion of control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control. . .
>
> (e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title. . .

Thus, the applicable federal statute of limitations for prior takings in this case is not six years. Congress provided:

in §(g):

> (g) Any civil action under this section,. . . shall be barred unless it is commenced within *twelve years* of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest *knew or should have known* of the claim of the United States. (Emphasis added.)

The burden of proof that the landowners knew or should have known of the Air Force's recently asserted claims of prior takings is upon the government. No such evience was forthcoming at trial.

No assertion of the existence of prior takings of prescriptive easements by the government was raised in the initial proceedings in the District Court. The District Court granted the Defendant's motion under Rule 12a, F.R.C.P. The government was not required to answer.

Prior takings of easements were first asserted in 1992 by the government in the Court of Federal Claims (Answer to Second Amended Complaint, 3-4):

> . . .Defendant affirmatively alleges that, although Air Force planes fly below 500 and 1,000 foot minimum height restrictions during take-offs and landings at Kelly AFB, all such flights are within existing avigation easements held by defendant and do not intrude on any of the plaintiffs property rights. . .

A set of interrogatories addressed, in relevant part, to the elements of these "existing avigation easements" was fruitless. The Air Force refused to answer. Additional interrogtories, more narrowly framed, went unanswered until the trial court compelled response (Order, filed October 26, 1993). The gvernment's response was received in evidence as Plaintiffs' Exhibit 106 (Trans. 224-5).

The government was first given the oportunity to disclaim any "Preexisting easement(s) that Defendant will claim supporting a statute of limitations defense obtained under Federal law" (Plaintiffs' Second Request for Admissions to Defendant, pp. 1-2). From January 1, 1942 through December 31, 1949, the Air Force disclaimed easement acquisition. It refused to disclaim acquisition of easements by operation of the statute of limitations in each of four separate periods: 1950-59, 1960-69, 1970-79, and 1980-89. (Defendant's Response to Plaintiffs' Second Request For Admissions, pp. 1-2).

Petitioners propounded their "Plaintiffs' Second Set of Interrogatories" (pp. 1-2) addressing ten specific questions to the elements of ". . .each avigation, noise, crash hazard, or other type of easement claimed by Defendant against Plaintiffs' properties. . ." The "Defendant's Response To Plaintiffs' Second Set of Interrogatories" (pp. 2-7) is, to put it mildly, rambling and vague. Identifiable segments of claims of prescriptive easements include:

A. Easements acquired "sometime prior to 1917. . . from Wright Flyer airplanes. . ." (p. 5).

B. "Increases and expansions" of easements ". . . since 1917. . ." (p. 5).

C. ". . .(F)light pattern configuation parameters of avigation easements on property in the vacinity of Kelly AFB including Plaintiffs' properties . . .In approximately 1955 . . ." (pp. 5-6).

D. "The maximum parameters of noise and safety hazard servitude of the avigation easements over plaintiffs' properties were reached in 1964. The level of operations, the noise contours, and the recommendations for land use of affected properties are all contained in the Report dated November 1993. The Report dated November1993 similarly details the reduced levels of operations, noise, and safety

hazards subsequent to 1964." (p. 6).

E. "The existing usages of the plaintiffs' properties which are subordinate to the existing avigation easements in all of their parameters at any given time are within the knowledge of plaintiffs." (p. 6).

The one easement which is identifiable from the answers with reasonable certainly is a regulatory taking which the Air Force claims occurred in 1977 (pp. 6-7):

> The three safety zones at each end of the runways of Kelly AFB were established (along with safety zones adjacent to all other military air fields in the United States) by notice filed in the Federal Register, 42 Fed. Reg. 773, on January 4, 1977, and codified in 32 C.F.R. Part 256. This notice and regulation related to pre-existing safety hazards connected with military air fields in general and Kelly AFB in particular.

Subsequently, Respondent moved for summary judgment on the easements claimed to be delineated in the November 1993 report (Defendant's Motion for Summary Judgment, Exhibit W). Summary judgment was denied. (App. 8-11).

Each of these claimed easements, whether prescriptive or regulatory, impeaches and clouds the landowners' record titles. The government refuses to disclaim them. Each is thus within the exclusive original jurisdiction of the District Court and may result in the payment of compensation to the landowners.

II.

TO ASSERT A PERMANENT AVIGATION EASEMENT AGAINST UNDERLYING OWNERS, PERFECTION OF A PRESCRITIVE EASEMENT UNDER TEXAS LAW OVER A PERIOD OF TEN YEARS IS REQUIRED.

The controlling rule in Texas and many other jurisdictions is concisely summarized in *Tarrant County Water Control and Imp. Dist. No. 1 v. Fowler,* 175 S.W.2d 694, 700 (Tex. Civ. App. - Dallas 1943, writ ref'd for want of merit, 142 Tex. 375, 179 S.W. 2d 250 [1944]):

> Appellee's claim would not have been barred short of the period necessary to acquire lands by adverse possession, that is, ten years in this state. . . The conclusion just announced, in our opinion, is amply supported; the rule deduced from the weight of applicable authorities is stated in 18 Am.Jur. Sec. 394, P. 1042, as follows: ". . .On the other hand, it is held that where the Constitution requires compensation first to be paid before an owner's land is taken, the burden of prosecuting his claim for compensation cannot be placed on the owner prior to the running of the prescriptive period. . . ."

See also *Waddy v. City of Houston,* 834 S.W.2d 97, 102-3 (Tex. App. - Houston [1st Dist.] 1992, writ denied) and authorities cited therein.

This Court adopted this constitutional precept as to the inverse federal taking considered in *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed 336 (1947):

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, *as between private parties, a servitude has been acquired either by agreement or in course of time.* (Emphasis added).

Under the authority of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 72-73, 58 S.Ct. 817, 82 L.Ed 1188 (1938) and the Rules of Decision Act, 28 U.S.C. §1652, the law to apply is that of Texas.

The Federal Circuit arbitrarily applies the six year limitations statute of the Court of Federal Claims. Its holding and the parallel decisions of the 2nd, 3rd and 7th Circuits are

a quagmire of confusion, inconsistency and conflict. As noted in *287 Corporate Center Associates v. Town of Bridgewater,* 101 F.3d 321, 324 (3d Cir. 1996):

> 2. Fifth Amendment to the United States Constitution
>
> Associates also brought suit under the Fifth Amendment. Following *Wilson v. Garcia,* some Courts of Appeals, for purposes of consistency, have applied the personal injury statute of limitations to actions brought directly under the Constitution, Sec. e.g. *Bieneman v. City of Chicago,* 864 F.2d 463, 469-70 (7th Cir. 1988) (action brought directly under 5th Amendment), *cert. denied,* 490 U.S. 1080, 109 S.Ct. 2099, 2100, 104 L.Ed 2d 661 (1989); *Chin v. Bowen,* 833 F.2d 21 (2d Cir. 1987) (action brought directly under 14th Amendment).
>
> Assocites contends, however, that we should ignore *Wilson* and instead apply the most analogous state statute of limitations, N.J. St. Ann. § 2A:14-7, which provides, "Every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued." But in New Jersey, the most analogous state statute provides a six year limitations period. See N.J. Stat. Ann. § 2A:14-1. Although the statute does not explicitly reference inverse condemnation actions, New Jersey decisional law indicates it is the proper statute of limitations in such cases (Citing authorities). . .

The Supreme Court should use the case at bar to enunciate a single and logical rule of limitations for Fifth Amendment inverse takings.

The trial court erroneously cites from authorities involving only a temporary easement or non-permanent damages. *Creppel v. United States,* 41 F.3d 627 (Fed.Cir. 1994) draws a sharp line between temporary easements and permanent takings. A prior temporary taking may be barred by limitations while a current one is not.

III.

THE FACTS OF THIS CASE SHOW AN INCREMENTAL AND PROGRESSIVE PHYSICAL AND REGULATORY TAKING WHICH PRECLUDED THE ACCRUAL OF PLAINTIFFS' CAUSE OF ACTION UNTIL THE TAKING HAD "STABILIZED":

A. THERE WAS A PHYSICAL TAKING BY NOISE, CRASH HAZARD & LOW FLIGHT.

B. REGULATORY TAKING OCCURRED BY DEPRIVATION OF FEDERAL FUNDS AND FINANCING AND FEDERAL PROCURAL OF MUNICIPAL LAND RESTRICTIONS.

C. ACCRUAL OF THE CAUSE OF ACTION OCCURRED AT THE TIME OF "STABILIZATION."

In this case, ever-increasing federal physical intrusions have been paralleled and compounded by continuously more stringent federally proclaimed and federally procured regulations. In military terms, this is called a "double envelopment."

A. THERE WAS A PHYSICAL TAKING BY NOISE, CRASH HAZARD & LOW FLIGHT.

The leading authority for the taking of an avigation easement by noise and crash hazard is an opinion of the Supreme Court of the United States. In *Griggs v. County of Alleghany,* 369 U.S. 82, 85, 87 S. Ct. 531, 532, 8 L.Ed.2d 916 (1962). After detailing the evidence of noise, crash hazard, and low flight, Justice Douglas concluded:

> The glide path for the northeast runway is as necessary for the operation of the airport as a surface right of way for operation of a bridge, or as is the land for the operation of a dam (Citing authorities)... Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

A federally proclaimed Accident Potential Zone is, by

definition, an impact zone. In *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 387 (1922), the Supreme Court found a taking by the placement of shore batteries to fire across the condemnee's land.

Compensation has also been mandated for the creation of a *de facto* federal impact zone. In *Eyherabide v. United States,* 345 F.2d 565, 567 (Ct.Cl. 1965), Plaintiffs' land was bounded on three sides by an artillery target area. The Court held:

> The interference with use of possession may be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive powers. When these factors exist, a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as a fee title, an easement, a servitude, or a lease-hold.

As admitted by the Air Force, supra Point ID, and shown by DX 23b and DX 24b, government aircraft frequently and regularly fly below legal minimum altitude.

B. REGULATORY TAKING OCCURRED BY DEPRIVATION OF FEDERAL FUNDS AND FINANCING AND BY FEDERALLY PROCURED MUNICIPAL LAND RESTRICTIONS.

As *Eyheribide,* supra, states, regulatory actions may be considered along with physical intrusions. In the case at bar, the Defendant (1) proclaimed the AICUZ regulation in 1977, which it claims as an easement *per se,* (2) expanded the AICUZ regulation by incorporating it into a HUD regulation in 1984 denying federal funds or financing to the APZ's and (3) in 1986 procured municipal overlay and zoning ordinances as mandated in the AICUZ regulation. (App. F, § 256.4[2])

C. ACCRUAL OF THE CAUSE OF ACTION OCCURRED AT THE TIME OF "STABILIZATION."

The existing law in the Court of Appeals for the Federal Circuit, and, therefore, in the Court of Federal Claims, is comprehensively articulated by *Applegate v. United States,* 25 F.3d 1579, 1580 (Fed. Cir. 1994). Extensive quotation is in order:

> . . . Because the landowners' claim did not accrue more than six years before its filing, this court reverses and remands for further proceedings. . .
>
> Therefore, this court's review of the trial court's action depends upon when this alleged taking accrued. The Supreme Court set forth the standard for accrual in cases alleging takings of a continual nature. *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).
>
> On this basis, the Supreme Court clarified: "The Government. . .left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in [an onging] process of acquisition by the United States when the fact of taking could no longer be in controversy." Id. at 748, 67 S.Ct. at 1384. Under these circumstances, the Supreme Court explained that the claimant can postpone filing a suit "until the [continuing taking] situation becomes stabilized." Id. at 749, 67 S.Ct. at 1385. In other words, the Supreme Court reiterated that the owner may wait until "the consequences of inundation have so manifested themselves that a final account may be struck." Id. Moreover, *Dickinson* discouraged a strict application of accrual principles in unique cases involving Fifth Amendment takings by continuous physical processes. *Dickinson,* 331 U.S. at 749, 67 S.Ct. at 1385.
>
> *This court's predecessor, the United States Court of Claims, applied the Dickinson doctrine. See e.g. Castro v. Unied States,* 205 Ct.Cl. 534, 500 F.2d 436, 440 (1974).

The Federal Circuit's reliance upon *Castro v. United States,* supra, is especially significant. The *Castro* Court held at 500 F.2d 436:

The *Dickinson* rule has been applied by this court in other situations...

> *The same rule has been applied in cases involving avigation easement where the impairment of land use by overflights was progressive and its frequency and seriousness were not fully ascertainable until a period of years had elapsed. Avery v. United States, 330 F.2d 640, 165 Ct. Cl. 357, (1964); Aaron v. United States 311 F.2d 798, 160 Ct. Cl. 295 (1963) and 340 F.2d 655, 167 Ct. Cl. 818 (1964), and Klein v. United States, 152 Ct. Cl. 221 (1961), cert. denied, 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed. 2d 847 (1961).*

The recent *Associates* decision, *supra*, of the Third Circuit discusses deferred accrual of a cause of action under the Fifth Amendment:

> Associates contends the taking of its property amounts to a "continuing wrong," which effectively tolls the statute of limitations. We have held that under proper circumstances, the "continuing wrong" doctrine may apply:
>
> > In most federal causes of action, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period. . .
>
> *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1295 (3d Cir. 1991). The focus is on the defendant's "affirmative act[s]." Id. at 1296.
>
> The Township has not committed an affirmative act since 1985. The facts of the alleged taking stabilized almost ten years before Associates filed its lawsuit. Associates is unable to allege facts which might bring it under the "continuing wrong" doctrine. See *United States v. Dickinson*, 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947) (holding that a landowner may "postpon[e] suit until the situation becomes stabilized.").

Noise Levels at Specific Point: N1
Kelly AFB

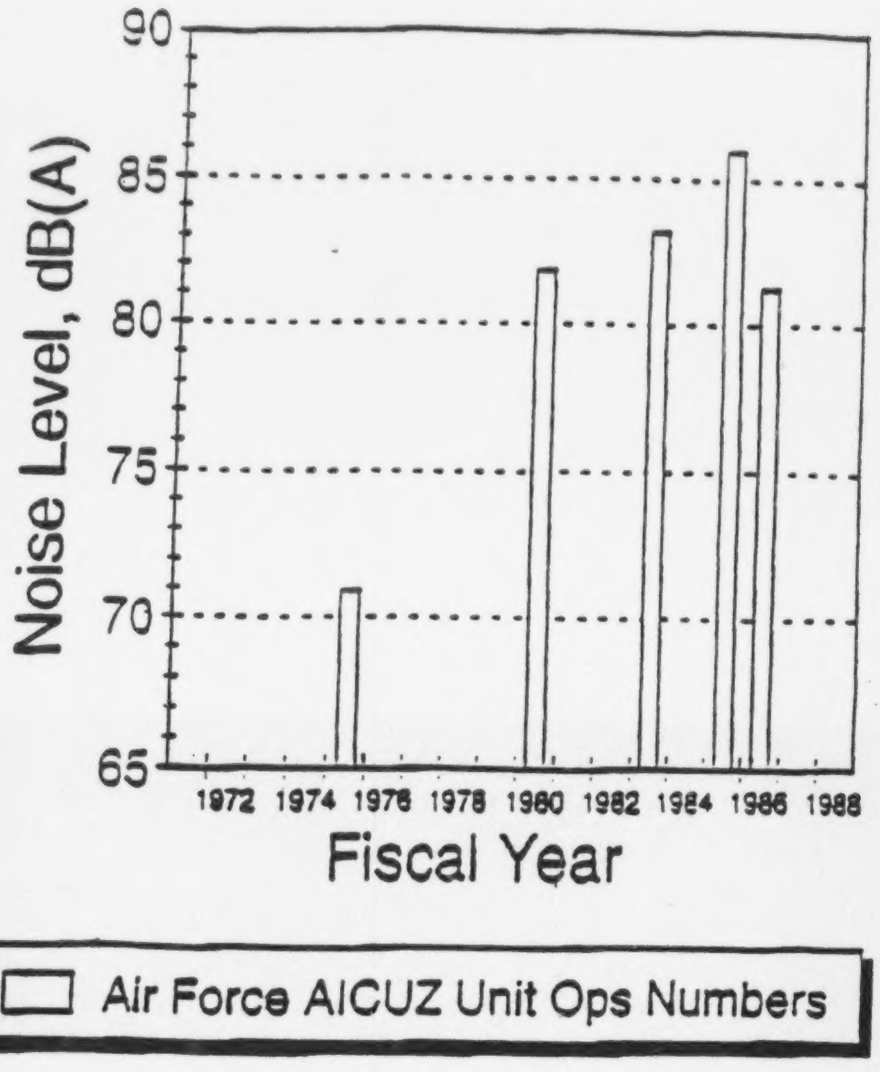


Figure 7

The following graph, *Figure 7,* for Point N1 is an extract from the evidence (PX 104). The other points N2, S1 and S2 are substantially identical. It is taken from discovery received from, prepared by, and admitted by the Air Force. It shows a very steady *progression* from FY 1975 through FY 1985, *stabilization* in 1985 and a *decline* in FY 1986.

FIGURE 7

It should be noted that Ldn is a logarithmic scale. (PX 8). A sound level of 75 is ten times greater than 65 and 85 is ten times greater than 75. Thus, 85 is 100 times as great as 65.

The noise levels reported for 1980 reflect the introduction of the noisier F4C fighter aircraft. Those in 1985 show the escalation in noise from the stationing of the giant C5A transport. In 1986, the quieter F-16 Fighter began replacing the F4C (DX 6).

Reliance upon *Hero Lands Co. v. United States,* 1 Cl.Ct. 102, aff'd, 727 F.2d 1118 (Fed. Cir. 1983), cert. denied, 446 U.S. 972 (1984) and similar cases (App. 25) is inappropriate under the facts of this case. *Dickinson* was neither raised in these cases nor was it applicable. The Court in *Hero* found a flat, continuous, usage over a period of 8 years. In *Hero,* the Court notes:

However, the evidence does not establish that the A-7 and A-37, as they passed above Tract 7, were substantially more disturbing because of noise, etc. than the A-4 and F-8 had been.

The Federal Circuit held in the case at bar (App. D):

> Appellants argue that their causes of action accrued well after the 1982 critical date because noise levels did not stabilize until 1985. However, the law is clear that stabilization of the noise level is not dispositive. Rather, the dispositive issue is when the noise level reached an intolerable level and resulted in a taking. We agree with the Court of Federal Claims that the general principle of *Dickinson* applies: "a claim for taking based on continuing acts of physical invasion does not accrue until the extent of the invasion and the degree of the interference is known or should be known." *Persyn II,* 34 Fed. Cl. at 197 (citing *Aaron,* 311 F.2d at 801). We further agree with the trial court that "the extent of the invasion and the degree of interference is ascertainable when the United States *begins* to operate its aircraft at low elevation and with such frequency that they substantially interfere with the use and enjoyment of the land, with the intent to continue such flights indefinitely." *Id.* (citing *A.J.Hodges,* 355 F.2d at 596).

Noise may become "intolerable" long before it "stabilizes." If an extended period is measured from its *beginning* rather than its *end*, there is simply no extension. This reasoning is grounded neither in precedent nor logic.

Applegate and *Castro*, supra, should be controlling. They establish an authoritative linkage between the Supreme Court's ruling in *Dickinson* and the Claims Court's application of *Dickinson* to avigation easements in *Avery, Aaron & Klein*, supra. All of these authorities require "stabilization." Prior "intolerability" is irrelevant.

If the rationale of the trial and appellate courts is valid, the landowners would have to have filed at least 3 separate suits to avoid the six year bar of limitations: (1) after 1977, when the Air Force claims to have taken an easement by promulgation of the AICUZ regulation, (2) after 1979, when noise levels escalated because of the stationing of the F4C and (3) the present suit. Multiplication of needless litigation is precisely what the *Dickinson* stabilization doctrine is intended to prevent.

CONCLUSION

The landowners, overwhelmingly elderly Belgian-American farmers and Hispanics, have been ruthlessly, systematically and slowly stripped of the use and benefit of their land without compensation. This has been accomplished by the federal executive powers in Washington with the active aid and acquiesence of the municipal government of San Antonio. To date, the federal judiciary has declined to intervene. The very formidable protections afforded the landowners by the Constitution and common law of Texas have been pierced. Equally stringent safeguards arising from the Fifth Amendment and by the enactment by Congress of the Rules of Decision and Quiet Title Acts have been ignored. Even the doctrine of progressive takings pronounced by this Court has been circumvented in a most cursory fashion. Only the Supreme Court can now right this great wrong.

Respectfully submitted,

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FILED

NO. 96 1554 MAR 27 1997

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

DARSON H. PERSYN, CLOTILDE PERSYN,
FLORENT BAECKE, MILDRED V. BAECKE, ET AL

Petitioners

v.

THE UNITED STATES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX VOLUME I
Appendix A, B & C

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APPENDIX A

In the United States Court of Federal Claims

No. 91-1535L

(FILED: January 4, 1995)

* * * * * * * * * * * * * * * * *

DARSON H. PERSYN, et al.,

Plaintiffs,

v.

FIled
Jan 4 1995

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * *

Craig L. Austin, San Antonio, Texas, for plaintiffs.

Stuart B. Schoenburg, Washington, D.C., for defendant. *Major David Vecera,* Washington, D.C., of counsel.

ORDER

TIDWELL, Judge:

This case is before the court on plaintiffs' motion to remand, filed July 21, 1994. For the reasons that follow, plaintiffs' motion is denied. Oral argument is not deemed necessary.

FACTS

Plaintiffs in this action are the landowners of property located adjacent to or near Kelly Air Force Base (KAFB) in San Antonio, Texas. In 1988 plaintiffs filed suit in the United States District Court for the Western District of Texas against the United States and the City of San Antonio. In their complaint, plaintiffs alleged that, in violation of the Fifth Amendment, the United States and the City had damaged and taken plaintiffs' property without just compensation by "overflight noise and exposure to hazardous activities, and by constitutionally invalid zoning regulations...." Plaintiffs sought damages against defendant and the City of San Antonio in the amount of $16,754,352.50.[1]

Both defendants moved to dismiss the district court complaint. On May 15, 1990, the district court determined that the zoning ordinance was not an unconstitutional taking, and dismissed the claim against San Antonio pursuant to FRCP 12(b)(6). *Persyn, et al. v. United States,* No. SA-88-CA-714, No. SA-89-CA-1708 (May 15, 1990). In response to the United States' motion to dismiss, plaintiffs argued that 28 U.S.C. § 1500 would leave them without a forum if the claim was dismissed. The district court found this argument to be meritless, and issued an order transferring the claims against the United States to this court for further proceedings.

Plaintiffs immediately appealed the district court's order to the United States Court of Appeals for the Fifth

---

[1] An identical suit was filed in the District Court on December 6, 1989, by J.L. and Herminia L. Guerra, and was subsequently consolidated with the Persyn case.

Circuit. In a decision dated July 15, 1991, the fifth circuit held that the order dismissing the City and transferring the claims against the United States was not an appealable final order and, therefore, the fifth circuit lacked the jurisdiction to review the order. *See Persyn v. United States,* 935 F.2d 69, 73-74 (5th Cir. 1991). Plaintiffs did not file a petition for certiorari in the United States Supreme Court.

On October 22, 1991, the record, as transferred from the district court was filed in this court pursuant to RCFC 84(a)(1). Subsequently, on November 26, 1991, plaintiffs filed a complaint in this court, incorporating the claims previously pending in the district court. In July 1992 plaintiffs filed their first amended complaint, adding additional plaintiffs to the caption and specifically invoking the jurisdiction of this court. Plaintiffs' second amended complaint was filed on November 23, 1993.

In April 1994 defendant filed a motion for summary judgment, alleging, *inter alia,* that this court lacks jurisdiction pursuant to 28 U.S.C. § 1500 over claims that the United States was liable for a regulatory taking based on the City's action in passing a zoning ordinance. Plaintiffs apparently saw merit in this argument and, on July 1994, filed the instant motion to remand the case to the United States District for the Western District of Texas. As grounds for the remand, plaintiffs frivolously argued that the order transferring this case was not valid because the claims against the City were *still* pending in the district court. Plaintiffs asked this court to find that it lacks jurisdiction and "remand" the case to the district court so that it can "enter a final judgment upon which either a proper re-transfer to this Court or an appeal to the Court of Appeals for the Fifth Circuit may be predicated."

1. *This Court lacks the Power to Transfer This Case to the District Court*

Under 28 U.S.C. § 1631.[2]

> Whenever a civil action is filed in a court as defined in section 610 of this title ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it was transferred.

28 U.S.C. § 1631 (1988). Because plaintiffs are seeking more than $10,000.00 in damages for the alleged taking of their property by the United States, the district court is not a court in which the action could have been brought. 28 U.S.C. §§ 1346, 1491. Therefore, assuming *arguendo* that this court lacked jurisdiction, plaintiffs' complaint would have to be dismissed, not transferred.

2. *28 U.S.C. § 1500 Does Not Deprive This Court of Jurisdiction*

In arguing that this court lacks jurisdiction based on 28 U.S.C. § 1500, plaintiffs employed an overly broad inter-

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[2] Although plaintiffs' motion is styled as a motion to remand, because the district court is a court of coordinate jurisdiction, the court assumes that plaintiffs' motion seeks a transfer, not remand.

pretation of section 1500. Section 1500 provides that:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (Supp. 1993). The time to determine whether an action on the same claim is pending in another court is the date a claim is filed in this court rather than the date a motion to dismiss is filed. *Keene Corp. v. United States*, ____U.S.____, 113 S.Ct. 2035, 2041 (1993).

In its motion for summary judgment defendant argued that the claim against the City of San Antonio is still pending within the meaning of section 1500. Defendant grounded its argument in the fifth circuit's decision in *Persyn v. United States*, 935 F.2d 69, 73-74 (5th Cir. 1991), wherein it was held that the order dismissing the City and transferring the case was non-final for purposes of appeal. Plaintiffs made the same argument in their motion to remand.

This argument is flawed and frivolous. Plaintiffs' claim against the City of San Antonio was dismissed in May 1990. In July 1991 the fifth circuit dismissed the appeal. The record

of the case was not transferred to this court until October 22, 1991, and it was not until November 26, 1991, that plaintiffs' complaint was filed in this court. Although the district courts' order transferring the case and dismissing the city was non-final for appeal purposes, the claim against the city did not remain behind like so much lost luggage in the district court.

CONCLUSION

Because the court finds that plaintiffs' claim against the City of San Antonio was not pending in the District Court for the Western District of Texas at the time the complaint was filed in this court, plaintiffs' motion to remand is denied.

IT IS SO ORDERED.

/s/ M. R. Tidwell

MOODY R. TIDWELL
Judge

APPENDIX B

In the United States Court of Federal Claims

No. 91-1535L

(FILED: January 19, 1995)

* * * * * * * * * * * * * * * * *

DARSON H. PERSYN, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Summary Judgment; Taking by Overflight; Frivolous Arguments and Claims; Federal vs. State Law.

* * * * * * * * * * * * * * * * *

Craig L. Austin, San Antonio, Texas, for plaintiffs.

Stuart B. Schoenburg, Washington, D.C., for defendant. *Major David Vecera,* Washington, D.C., of counsel.

ORDER

TIDWELL, *Judge:*

This case is before the court on defendant's motion for summary judgment and plaintiffs' motion to strike defendant's summary judgment evidence. For the following reasons, the court denies defendant's motion in part and grants defendant's motion in part. Plaintiffs' motion to strike is dismissed as moot.

FACTS

I. *Flight Activity*

Plaintiffs own land adjacient to or near Kelly Air Force

Base (KAFB)[1] in San Antonio, Texas. KAFB began operations in 1917 and is the oldest continously active flying field in the United States Air Force (USAF). Since its inception, the predominant flight pattern has been from north to south. Runway 15/33 was constructed in 1955. It runs roughly parallel to the former runway and is still in use today.

Throughout its long history numerous aircraft have used KAFB, although the aircraft models and the frequencies of their flights have varied over the years. The total number of aircraft operations has also fluctuated, with the greatest number in the mid-to-late 1960s. Each aircraft model has its own unique mix of flight characteristics.

II. *Regulations*

A. *The United States*

In the 1970s the Air Force adopted the Department of Defense's Air Installation Compatible Use Zone (AICUZ) program. The purpose of the AICUZ program is to promote compatible civilian development near military airfields. Under AICUZ guidelines there are three accident potential zones at the ends of every active runway at all United States Air Force bases. A 3000-by-3000 foot zone at each end of the runway is designated the "clear zone." Because of the high potential for accidents in this zone the United States has acquired all of the land in the clear zones adjacent to KAFB. The next zone, Accident Potential Zone 1 (APZ1), is 3000-by-5000 feet running from the end of the clear zone. Although the risk of accidents is not as high in APZ1 as in the clear zone, there is nonetheless, a significant risk of accidents in this zone. There is also a quantifiable risk of accidents in Accident

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[1] Kelly Air Force Base was given its current name in 1948. Prior to that it was known as Camp Kelly.

Potential Zone 2 (APZ2), which covers 3000-by-7000 feet at the end of APZ1.

In 1979 the Department of Housing and Urban Development (HUD) policy was that HUD assistance, subsidies and insurance were normally not available for "noise sensitive projects" in areas with high levels of noise. In 1984 HUD implemented a nationwide policy on "Siting of HUD Assisted Projects in Runway Clear Zones at Civil Airports and Clear Zones and Accident Potential Zones at Military Airfields." 24 C.F.R. pt. 51, subpart D (1994). Under this regulation projects that are inconsistent with Department of Defense recommendations for land use within accident potential zones will not be approved for HUD asssistance. The regulation does not apply to projects approved before the effective date of the regulation. 24 C.F.R. § 51.305. None of the plaintiffs in this action have ever applied for, or been denied HUD assistance.

B. *The City of San Antonio*

In 1952 the land surrounding KAFB became part of the City of San Antonio. In 1995 the city passed Ordinance No. 44845, which reflected recommendations contained in a 1975 AICUZ study. The ordinance established a clear zone and two Military Overlay Districts, known as MAOD-1 and MAOD-2 for land near military airports within the jurisdiction of the city. The Military Overlay Districts, were designed to "overlay" the regular zoning existing on the affected lands, limiting permitted uses to those allowed under both the regular zoning and in the Military Overlay Districts. The ordinance did not, however, specifically describe or place plaintiffs' properties within the Military Overlay Districts.

In August 1985 the Air Force presented the Mayor, the City Planner, the City Manager and the City Attorney of San Antonio with a formal briefing on the AICUZ study. The

Mayor subsequently held public hearings on the Air Force's recommended zoning. The Air Force attended these hearings and recommended that zoning should be changed to conform to the AICUZ concept. On April 17, 1986, the City passed a zoning ordinance that conformed with AICUZ restrictions, although it did not contain recommended noise attenuation measures.

III. *Proceedings in this Case*

On July 15, 1988, plaintiffs filed suit in the United States District Court for the Western District of Texas against the United States and the City of San Antonio. In their complaint, plaintiffs alleged that the United States and the city had damaged and taken their property without just compensation by increasing the frequency, noise level and danger of military aircraft flights over their property, and by enacting invalid zoning regulations.

By order dated May 15, 1990, the district court found that the zoning ordinance was not an unconstitutional taking and dismissed the claim against the city for failure to state a claim upon which relief could be granted. By the same order, the district court held that it lacked subject, matter jurisdiction over the claims against the United States. Accordingly, it transferred the remainder of plaintiffs' claims to this court. After the United States Court of Appeals for the Fifth Circuit determined that the district court order was non-final for appeal purposes, *see Persyn v. United States,* 935 F.2d 69, 73-74 (5th Cir. 1991), the record was filed in this court pursuant to RCFC 84(a)(1). Subsequently, on November 26, 1991, plaintiffs filed a complaint in this court, incorporating the claims previously pending in the district court.

In July 1992 plaintiffs filed their first amended complaint, adding additional plaintiffs to the caption and specifically invoking the jurisdiction of this court. Plaintiffs' second amended complaint was filed on November 23, 1993.

In April 1994 defendant moved for summary judgment, alleging, *inter alia*, that: (1) plaintiffs' claims based on physical takings are time-barred, (2) the actions of the City of San Antonio cannot be imputed to the United States, (3) claims of overreaching by United States' officials sounded in tort and, (4) the land use and zoning ordinances at issue do not constitute a taking. In response, plaintiffs argued, *inter alia*, that: (1) plaintifs claim for a physical taking under Texas law did not ripen until the United States adversely possessed its property for six years, (2), defendant took its property in 1984 when it restricted HUD financing to approved uses in accident potential zones and, (3) the actions of the local officials could be attributed to the United States because the "threshold requirement" of physical and regulatory action was met.

DISCUSSION

I. *Motion for Summary Judgment Under RCFC 56*

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC 56(c). The movant has the initial burden to identify from the record the absence of material issues of fact. *Celotex Corp. v. Carret*, 477 U.S. 317, 323 (1986). If the non-

moving party has the burden of proof on an essential element of the claim, the movant need not submit affidavits in support of the motion. *Id.* at 324. To defeat a motion made and supported under Rule 56, the non-moving party must go beyond the pleadings and affirmatively demonstrate the existence of a genuine issue for trial. *Id.* In deciding a motion for summary judgment, the court does not "weigh the evidence and determine the truth of the matter but [only] determine[s] whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Further, the court must "view the evidence in a light most favorable to the nonmoving party and draw all reasonable inferences in the favor." *Hodosh v. Block Drug Co.*, 786 F.2d 1136, 1141 (Fed. Cir. 1986) (citations omitted). Based on the standard of proof that would apply at trial, the court should ascertain whether there is sufficient evidence to warrant a directed verdict. *Anderson*, 477 U.S. at 254-55.

A. *Genuine Issues of Fact Preclude Summary Judgment on Plaintiffs' Claim that the United States Physically Took Plaintiffs' Property*

It is well settled that:

> [W]hen *regular and frequent flights* by Government-owned aircraft over privately owned land *at altitudes of less than 500 feet from the surface of the ground constitute a direct, immediate, and substantial interference with the use and enjoyment of the property,* there is a taking by the Government of an avigation easement, or easement of flight, in the airspace over the property and [ ] this

taking is compensable under the Fifth Amendment to the Constitution.

A.J. Hodges Indus., Inc. v. United States, 355 F.2d 592, 594 (Ct. Cl. 1966) (citations omitted) (emphasis added); *see also United States v. Causby,* 328 U.S. 256, 266 (1946). Even if the government regularly and frequently intrudes into airspace above a plaintiffs' property, however, there is no taking unless the "flights interfere substantially with the use and enjoyment of the land." *Causby,* 328 U.S. at 264 (citations omitted).

A cause of action for taking by overfight does not accrue until the United States takes action constituting direct interference with the enjoyment and use of the land, *Bacon v. United States,* 295 F.2d 936, 938 (Ct. Cl. 1961), with the intent to continue its interference. *Highland Park, Inc. v. United States,* 161 F.Supp. 597, 600 (Ct. Cl. 1958)(citations omitted). To comprise a compensable taking, it is not necessary that the flights continue for the length of time required to create an easement by prescription. *See id.* The extent of an easement taken by the government is the lowest elevation at which the government "regularly and frequently" intrudes upon a plaintiff's airspace. *Speir v. United States,* 485 F.2d 643, 647 (Ct. Cl. 1973). Even where the government has acquired an avigation easement a new taking can occur if the government increases its intrusion by flying substantially noisier planes within existing easements, or by flying at lower altitudes. *See, e.g., Avery v. United States,* 330 F.2d 640, 643 (Ct. Cl. 1964); *Branning v. United States,* 654 F.2d 88, 100 (Ct. Cl. 1981). Damages for the new taking, however, will be limited to actual damage from the new intrusion, to the extent such damage occurred within six years of the date the complaint is filed. *Hero Lands Co. v. United States,* 1 Cl.

Ct. 102, 107, *aff'd*, 727 F.2d 1118 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

In its motion for summary judgment defendant conceded that it regularly and frequently intrudes upon plaintiffs' airspace. It contended, however, that during the Vietnam War flight activity was higher, aircraft were noisier, and flights flew at lower altitudes than at any subsequent time. Therefore, defendant alleged that because it took an avigation easement over plaintiffs' property more than six years before plaintiffs filed their complaint, claims based on a physicial taking are barred by the statute of limitations.

In response, plaintiffs argued, frivously, that under the Rules of Decision Act, 28 U.S.C. § 1652, this court must follow Texas law to determine when plaintiffs' Federal Constitutional claim accrued.[2] This is not the case, as counsel for plaintiffs was informed on several occasions by this court. Under 28 U.S.C. § 1652, "[t]he laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide,* shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652 (1988) (emphasis added). Plaintiffs have alleged a violation of the Federal Constitution, therefore, the Rules of Decision Act has no bearing on this case. *See, e.g., Erie R.R. Co., v. Tompkins,* 304 U.S. 64, 72-73 (1938). As Justice Jackson noted more than half a century ago:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases

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[2] According to plaintiffs, their claim did not accrue under Texas law until the United States occupied their land for six years.

> it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is not juridicial chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law.

D'Oench, Duhme & Co. v. Federal Deposits Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring). Ignoring the court's prior determination that section 1652 is inapplicable in the instant case, plaintiffs argued that both *Causby*, 328 U.S. at 267, and *United States v. Dickinson*, 331 U.S. 745 (1947), support their position. Plaintiffs' claim that *Causby* and *Dickinson* "follow 28 U.S.C. § 1652," is groundless. In *Causby* the Supreme Court held that a landowner's right to use and exploit his property can be taken by low and frequent overflights. *Causby*, 328 U.S. at 262. The Court also noted that its finding that the plaintiff had a protectable property interest was consistent with state law. *Id.* at 266. In *Dickinson*, the United States flooded plaintiff's land by raising river levels over a period of years. *See Dickinson*, 331 U.S. at 746. The Court held that the landowner was not required to file until the taking was complete and the situation was stabilized. *Id.* at 749. Neither case purports to follow section 1652 and, when read in context, the quotations provided by plaintiffs do not support the claim that this court must follow *Texas* law to determine when plaintiffs' *federal* claims accrued. *See generally, Causby*, 328 U.S. 256: *Dickinson*, 331 U.S. 745.

Plaintiffs' position is that the physicial taking

"matured" in 1985. Although it is clear from the record before the court that the total number of aircraft operations at KAFB was greater in the 1960s than at any time since, the question of whether there was a taking by overflight at that time cannot be resolved merely by comparing numbers. There are genuine issues of fact as to the noise generated by the aircraft models, the frequency of flight for different models, the altitudes of flight, the hours of flight, the effect on the use and enjoyment of plaintiffs' land, and the damages, if any, attributable to overflights occurring after July 15, 1982. Therefore, although the court rejects plaintiffs' argument that a claim for taking by overflight does not accrue until the United States has "taken" plaintiffs' property for a six-year period, the court is constrained to find that genuine issues of fact preclude summary judgment on plaintiffs' claim of a taking by overflight.

B. *Plaintiffs' Regulatory Takings Claims Are Without Merit*

1. *The 1984 HUD Regulation Was Not A Taking of Property*

In their response to defendant's motion for summary judgment, plaintiffs argued, apparently for the first time, that the designation of Accident Potential Zones in 1977 "matured" into a regulatory taking in 1984 when HUD adopted a policy of not lending money for projects in accident potential zones that did not conform to DOD guidelines. Plaintiffs cited *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), and *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965), for the proposition that the 1977 and 1984 regulations were a compensable taking.

In both cases, however, the allegation was that the government had physicially intruded upon plaintiffs' property; *neither case involved a regulatory taking. See Portsmouth,* 260 at 329-30; *Eyherabide,* 345 F.2d at 567. The court notes that plaintiffs also erroneously represented that in *Portsmouth,* the "landowner was [allowed] full compensation when the Navy turned its real estate into an impact area." The Supreme Court did not reach the merits of plaintiff's claim in *Portsmouth,* it merely reversed the Court of Claims' dismissal of plaintiff's claim. *Portsmouth,* 260 U.S. at 330.

Further, the Fifth Amendment of the Constitution does not require the government to compensate parties for the "taking" of any interest that may broadly be defined as "property." Rather, before compensation will be owed, plaintiffs must establish a protected property interest. *See Lucas v. South Carolina Coastal Council,* ____U.S.____, 112 S.Ct. 2886, 2901 (1992). Plaintiffs did not identify what property was "taken" by the allegedly offending regulations.

Neither regulation in any way prohibits plaintiffs from using their property in any manner. The 1977 regulation merely provides "guidelines" for suggested uses that would conform with the hazards associated with land adjacent to or near military airports. The HUD regulation also does not prohibit use, it merely denies government funding for certain projects, unless the financing was approved before effective date of the regulation. None of the plaintiffs in this case have ever sought, let alone denied, HUD financing. (Defendant's Ex. S). Therefore, even if a property interest could arise based on HUD approval, under the facts of this case, plaintiffs would have no standing to raise this issue.

The court notes that although plaintiffs see a "clear and certain claim [by defendant] of the taking of a statutory easement by promulgation of [the 1977] regulation," the court does not discern such a claim in defendant's papers. The court is also unable to perceive the basis of plaintiffs' claim that the "burden" of the *regulation* was increased when the Air Force started flying the C-5A out of KAFB.

2. *The Regulatory Action of the Local Zoning Authorities May Not be Imputed to the United States to Create Liability for a Regulatory Taking*

Plaintiffs' claim of a federal regulatory taking based on the 1984 city zoning ordinance also must fail because there is no evidence of an essential element of its claim—federal regulatory action. *See, e.g., De-Tom Enters., Inc. v. United States,* 552 F.2d 337, 339 (Ct. Cl. 1977). Further, plaintiffs' argument that the court can attribute the actions of the City of San Antonio to the United States to find a federal regulatory taking is wholly without merit.

It is well-settled that the United States may sue its power as a landowner to influence local zoning authorities without incurring liability for a "taking." *See e.g., De-Tom,* 552 F.2d 339. Although the law on this issue is clear, plaintiffs argued that the "threshold to the application of the rule is equally clear, When other separate acts of Federal officials amounting to a taking are alleged, the courts will consider the influencing along with these other acts." To support this proposition, plaintiffs disingenuously used ellipses to combine a sentence from the *facts* in *Blue v. United States,* 21 Cl. Ct. 359, 361 (1990), with a sentence found seven paragraphs later in the *discussion, id* at 362.

Blue does not, however, support plaintiffs' claims. The plaintiffs in *Blue* argued that the Air Force's dissemination of AICUZ reports, coupled with its extensive participation in the rezoning of plaintiff's property amounted to a taking of property. *Id.* at 360-61. The court held that the plaintiff's claim failed to state a cause of action upon which relief could be granted because there was no federal regulatory activity. *Id.* at 362-63. Taken in context, therefore, it is clear that *Blue* stands to the proposition that the "threshold federal action requirement" for a regulatory taking, is *federal regulatory action.*

Plaintiffs argument is also contrary to the holding of *De-Tom,* 552 F.2d at 339. In *De-Tom,* plaintiff alleged that the government wrongfully persuaded local officials to deny its zoning application. *Id.* The court held that the United States could not be liable for a regulatory taking unless its *own* regulatory activity was so extensive as to amount to a taking. *Id.*

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment on plaintiffs' claim of a taking by overflight is denied. Defendant's motion for summary judgment on plaintiffs' claims based on a regulatory taking is granted. Plaintiffs' motion to strike defendant's summary judgment evidence is dismissed as moot.

IT IS SO ORDERED.

/s/ M. R. Tidwell

MOODY R. TIDWELL
Judge

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 91-1535L

(FILED: September 27, 1995)

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DARSON H. PERSYN, et al.,	Judgment On Partial Findings Under RCFC 52(c); Voluntary Dismissal Under RCFC 41(a)(1)(A); Involuntary Dismissal Under RCFC 41(b); Accrual Of Claims for Taking Of An Avigation Easement; Elements And Burden Of Proof For Claim Of Taking Of Avigation Easement.
Plaintiffs,	
v.	
THE UNITED STATES,	
Defendant.	

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CRAIG L. AUSTIN, San Antonio, TX, for plaintiffs.

Stuart B. Schoenburg, Washington, D.C., for defendant, *Major Dawn Scholz* and *Major David Vercera,* Washington, D.C., of counsel.

ORDER

TIDWELL, *Judge*:

This matter is before the court on defendant's motion for Judgment on Partial Findings, pursuant to RCFC 52(c), made at the close of plaintiffs' case, on all thirty-four claims of an avigation easement by physical taking from overflights of aircraft from Kelly Air Force Base (KAFB or Kelly) in San Antonio, Texas. For the reasons set forth below, the court grants defendant's motion, and dismisses the complaint.[1] In a related Order issued today, counsel for plaintiffs is ordered to show cause why he should not be sanctioned for his actions at trial. The court will address the latter Order in conjunction with its Order to Show Cause of January 19, 1995, for unprofessional actions of plaintiffs' counsel that occurred during the pre-trial phase of this litigation.

FACTS

A. Background of the Claims

1. History of Kelly Air Force Base

KAFB is located approximately seven miles from the geographic center of San Antonio and surrounded by the

[1] The court advised the parties at the close of plaintiffs' case at trial that it intended to allow defendant's RCFC 52(c) motion, and that its findings and conclusions would be formally stated in this written Order.

the city of San Antonio and Lackland Air Force Base. KAFB was established as Camp Kelly in May 1917 and renamed Kelly Field two months later. In December 1917 Kelly was divided into two fields. Pilot training, supply functions and warehouses were located at field No. 1;p field No.2 was used for flight instructor training. In 1925 the Aviation Repair Depot was moved to Kelly No. 1, and the field was renamed Duncan field. From 1925 until 1943 Kelly Field and Duncan Field functioned separately. In March 1943 the flight school was moved to Randolph Field, and Kelly and Duncan Fields were joined as Kelly Field. In January 1948 Kelly Field was renamed Kelly Air Force Base.

The 2851st Air Base Group is the host organization at KAFB; its tenants include a number of organizations including the San Antonio Air Logistics Center (SAALC), the 149th Tactical Fighter Group and the 433d Tactical Airlift Wing. According to an Air Force Study published in 1975, there were an average of fifty-two sorties[2] per day from Kelly in November 1972 through October 1973. In the year ending October 1973, jet aircraft stationed at Kelly accounted for forty-five percent of the sorties; the remaining sorties were performed by transient jet aircraft. The fleet of aircraft stationed at Kelly in October 1973 included the F-100, T-39, C-130, B-52, C-5A[3] F-106, T-30 and the F-5.

On or before 1975, the SAALC became the logistic

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[2] A sortie is a total flight mission; it may include any number of operations.

[3] Early reports refer to the C-5 rather than the C-5A; the two terms are synonymous. *See*JANE'S ALL THE WORLD'S AIRCRAFT 377-78 (John W.R. Taylor ed. 1975-76).

support manager for the Military Aircraft Command's C-5A Galaxy jet transport fleet. The SAALC also overhauls the Strategic Air Command's B-52 bomber. The KAFB mission includes flight testing in conjunction with depot maintenance of the C-5As and B-52s.

During the 1970s the United States Air Force (USAF) recognized that lands located at the ends of active runways were subject to statistically greater risks of aircraft accidents than lands located elsewhere. Accordingly, the USAF adopted the Department of Defense Air Installation Compatible Use Zone (AICUZ) program designating lands at the end of active runways as being in clear zones or accident potential zones (APZs). The clear zone is a 3,000 foot by 3,000 foot area adjacent to the center line of the runway; it is owned by the USAF. APZ1s are located immediately adjacent to the clear zone. They are the same width as the clear zone, but are 5,000 feet in length. APZ2s are the same width but begin at a distance of 8,000 feet from the end of each active runway and extend to a distance of 15,000 feet from the end of the runway.

In 1979 the 149th Tactical Fighter Group converted from the F-100 aircraft to the F-4C aircraft. By 1981 noise levels for land surrounding KAFB were 175 percent greater than 1975 levels; this increase was attributable to the introduction of the F-4C in 1979. From 1980 through 1986 the F-4C flew approximately ninety operations per day. According to a 1981 Air Force study, there were 444.34 operations per day in 1980[4] or, assuming a five day week, 115,528.4 operations per year. It is not clear from the study whether these were total operations from all aircraft using Kelly

[4] Although the November 1981 AICUZ report does not identify what year the data was compiled, the parties indicated it reflects 1980 data.

in 1980.

In 1984 an Environment Assesssment (EA) was completed for a proposal to convert the 433d Military Aircraft Wing's (MAW) C-130B aircraft to the C-5A aircraft. According to the 1984 EA, annual aircraft operations after the proposed change were expected to increase to 69,921 from 67,585 in 1983.[5] The report concluded that the conversion would cause slightly expanded noise levels to the northwest and southeast of the base, and the Air Force made a finding of No Significant Impact with respect to the proposal to add sixteen C-5As to Kelly's aircraft fleet.

By 1986 the 433d MAW had received only five of the sixteen C-5As originally proposed. A 1986 EA, completed for a proposal to replace eighteen F-4C aircraft with twenty F-16 aircraft, predicted that the sixteen C-5As would conduct twenty-one operations per day, and that annual operations from the sixteen aircraft would account for 5,621 of 89,588 annual operations. There was no evidence to indicate the average daily operations from the five C-5As actually assigned to the 433d MAW by 1986. The 1986 EA reported that "noise impacts of current operations are somewhat lower than those indicated in the [1981] AICUZ report." AIR FORCE LOGISTICS COMMAND, U.S. DEP'T OF THE AIR FORCE, ENVIRONMENTAL ASSESSMENT 33, 35 (1986). There was no evidence that all sixteen projected C-5As were in fact delivered to Kelly.

Until 1985 or 1986 there were two active runways at

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[5] Again, it is impossible to tell from the report whether aircraft operations were the total operations from all aircraft using Kelly.

KAFB. Runway 15/33, built in 1955, is 300' wide by 11,550' long. In 1980 more than eighty percent of the flights to or from KAFB took off or landed on runway 15/33. Runway 14/32, which is almost parallel to runway 15/33, was also in use until approximately 1985 or 1986. By 1980 it accounted for only twenty percent of all flight activity at KAFB.

2. *The Plaintiffs and the Properties at Issue*

Plaintiffs are the current owners of thirty-four parcels of land, designated parcels "A" through "II," located adjacent to or near KAFB. Thirty-one of the thirty-four parcels are located to the southeast of KAFB, and three are located to the northwest. All of the parcels at issue in this case are located, at least in part, in the APZs for KAFB runway 15/33. Most of the parcels are also located in the south APZs for runway 14/32.

B. *Proceedings in this Case*

On July 15, 1988, plaintiffs filed a complaint in the United States District Court for the Western District of Texas.[6] alleging that their land was "expropriated and damaged" by the United States and the City of San Antonio by "overflight noise and exposure to hazardous activities, and by constsitutionally invalid zoning regulations." The combined total of all the claims exceeded sixteen million dollars. The district court subsequently granted the City's motion for dismissal under Fed. R. Civ. P. 12(b)(6), and transferred the claims against the United States to this court.

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[6] J.L. and Herminia Guerra filed suit on December 6, 1989. The district court consolidated the cases.

On November 26, 1991, plaintiffs filed a complaint in this court incorporating the claims that were filed in the district court. On July 1, 1992, plaintiffs filed a first amended complaint, in which they added additional plaintiffs to the caption and specifically invoked the jurisdiction of this court. Plaintiffs filed a second amended complaint on November 23, 1993, alleging that the United States took their properties by: 1) physical invasions of noise, exposure to accidents and low level overflights; 2) engaging in a deliberate campaign to induce fear into the minds of prospective purchasers, with the intent to decrease the market value of the subject properties; and 3) using undue influence to persuade the City of San Antonio to enact a restrictive zoning ordinance applicable to the subject properties.

On April 18, 1994, defendant filed a motion for summary judgment on plaintiffs'claims. By order filed January 19, 1995, the court found there were "genuine issues of fact as to the noise generated by [prior and current] aircraft models, the frequency of flight for different models, the altitudes of flight, the hours of flight, the effect on the use and enjoyment of plaintiffs' land, and the damages, if any, attributable to overflights occurring after July 15, 1982." *Persyn v. United States,* 32 Fed. Cl. 579, 584 (1995). Therefore, although it granted defendant's motion for summary judgment as to all other claims, the court denied defendant's motion for summary judgment as to all other claims, the court denied defendant's motion for summary judgment on plaintiffs' physical takings claims based on alleged low overflights of military aircraft.

At a pretrial conference on May 11, 1995, the court resolved certain disputes related to the admissibility of some

of plaintiffs' evidence and discussed, but reserved ruling on, whether two plaintiffs listed as witnesses could testify as experts. Although the parties had not stipulated to any facts in pretrial filings, the court asked whether they could stipulate that Kelly was located in an uncongested area of San Antonio. Plaintiffs' counsel was unwilling to stipulate to this, but stated that the floor for a taking would be flights above 500 feet. Although counsel's statement that the floor for a takings claim would be 500 feet in an uncongested area, the court informed the parties that they should arrange a site visit for the court prior to trial.

At the conference, defendant argued that it was entitled to a directed verdict before trial because there was no evidence upon which plaintiffs could prevail. Based on the exhibits and witnesses listed in plaintiffs' Appendix G filings, counsel's pretrial memorandum and statement of proposed finding of fact, as well as statements made by counsel at the pretrial conference, the court had serious doubts that plaintffs' counsel understood the applicable law and was prepared to present colorable claims for relief. Although the court determined that plaintiffs should be given the opportunity to go forward, it reiterated the elements that plaintiffs were required to establish to prevail on a claim for taking of an avigation easement. Counsel assured the court that he would prove physical takings after July 15, 1982.

At the May 11, 1995 pretrial conference, defendant agreed to stipulte to ownership of the parcels with the exception of parcels Y, AA, CC and EE. With respect to parcel Y, the complaint listed the owners as: Clara Persyn, George and Irma Verstuyft, Darson and Cleothilde [sic] Persyn, and Henry and Juliana Verstuyft. Defendant alleged that Henry –

Verstuyft was the sole owner of parcel Y from 1976 through 1993; in 1993 he allegedly executed a deed transferring the property to Caesar Verstuyft. Defendant also alleged that the legal descriptions in the complaint for parcels AA and Z were identical. Further, defendant maintained that although the claim for a taking of parcel CC was filed by margaret G. Brown as sole owner, she was a joint owner with George Brown until his death on Jnuary 8, 1986. Upon his death, half of his interest in the property was transferred to his wife by operation of law (leaving her with a seventy-five percent interest in the property): The remaining interest in the property went in equal shares to his five children. On May 20, 1986, the five children voluntarily transferred their interest to their mother. Defendant also raised objections to parcel EE and plaintiffs' counsel agreed to voluntarily dismiss this parcel from the suit to render the objection moot. Because the parties were unable to stipulate to ownership of parcels Y, AA and CC, the court instructed plaintffs' counsel that standing and ownership would have to be proved for those parcels.

On June 9, 1995, plaintiffs filed motions to substitute the estate of Darson Persyn as a party, and amend plaintiffs' second amended complaint to: 1) change the caption of the claim to read "Estate of Darson H. Persyn, Dec'd, et al. v. United States;" 2) add the children of George Brown, Dec'd, and Margaret Brown as plaintiffs in this case; and 3) strike the names of Clara Persyn, George and Irma Verstuyft, Darson and Clotilde Persyn, and Juliana Verstuyft as owners of parcel Y. Plaintiffs Henry B. and Rosie R. Garcia also filed a notice of voluntary dismissal under RCFC 41(a)(1)(A). Because these motions were not filed in the clerk's office in Washington, DC, until the last business day before trial,

counsel for plaintiffs provided the court with courtesy copies at the opening of trail.

Trial of this case took place on June 12-14, 1995, in San Antonio, Texas. As an initial matter, the court allowed plaintffs' unopposed motion to substitute the estate of Darson Persyn as a party to this action. Although defendant raised no objection to the motion to substitute the estate of Darson Persyn, it did object to dismissal of plaintiffs Henry and Rosie Garcia pursuant to RCFC 41(a)(1)(A). Specifically, defendant argued that a dismissal under RCFC 41(a)(1)(A) could not be made after service of the answer or response, and dismissal under this section would prejudice defendant in any effort to recover the costs of this suit. The court informed the parties that it would take this matter under advisement, and proceeded to hear opening statements.

The presentation of these thirty-four takings claims was a farce. The claims followed no discernable theory but rather were an amalgamation of rambling, irrelevant testimony completely unsupported by objective evidence. Despite being warned time and again by the court duing the pre-trial phase of the case, plaintiffs' counsel insisted upon adhering to a scenario bearing no relation to the actual facts that the court was able to find from its analysis of the entire record. Seven plaintiffs, three of whom lacked personal knowledge of events before July 15, 1982, testified as witnesses. Although plaintiffs were informed that the statute of limitations was an important factor in this case, counsel did not produce a single piece of reliable documentary evidence dated after 1981.[7]

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[7] The court notes that defendant introduced, without objection, two Environmental Assessments prepared after July 15, 1982, the relevant date for statute of limitations purposes.

Although two of the witnesses, Terry Britton and John Miller, had been identified in Appendix G filings as experts, neither was qualified as an expert at trial. Plaintiffs' counsel did elicit testimony from Mr. Britton regarding his experience in real estate, and asked Mr. Britton if he "considered [him]self as having expert knowledge of commercial real estate in the area that we are talking about [San Antonio]." Counsel did not, however, offer Mr. Britton to the court as an expert in any field, and the court did not consider him to be testifying as an expert rather than a fact witness.

As their sole expert witness, plaintiffs called Mr. Kirby Gholson. Mr. Gholson claimed a background in real estate even though he received his certificate as a state appraiser *thirty minutes* before he was called to the stand. Gholson claimed some undefined involvement in preparing several of the exhibits offered at trial but totally lacked the knowledge or expertise necessary to give the exhibits relevance. Gholson had prepared an "appraisal" of the subject properties, and even offered testimony purporting to be relevant to the height of aircraft flying over the APZs. Defendant objected to the identificatiion of Gholson as an expert witness, but the court reserved ruling on whether Gholson was qualified.

After observing Mr. Gholson's demeanor and listening to his testimony on direct and cross examination the court was forced to conclude that Mr. Gholson was completely lacking in professional objectivity, integrity or competence. His testimony and report were filled with illogical statements, outright errors, arbitrary decisions and lack of reasonable judgments. Despite the fact that Mr. Gholson testified under oath, the court also identified several outright falsifications

in his testimony. Although Mr. Gholson knew the terminology of an expert, the court concluded that he was no more an expert on San Antonio land value, than was the court. In light of the glaring inadequacies in Gholson's report, and the fact that he had been deposed twice before trial, the court cannot find that plaintiffs' counsel was unaware, at the time this witness took the stand, that Gholson's entire testimony would be made up of whole cloth.

After plaintiffs rested, defendant moved for a directed verdict.

DISCUSSION

I. *Voluntary Dismissal Under RCFC 41(a)(1)(A)*

As an initial matter, the plain language of RCFC 41(a)(1)(A) only allows a party to unilaterally dismiss itself from a case before the answer or a response is served. *See* RCFC 41(a)(1)(A). A dismissal under RCFC 41(a)(1)(A) does not automatically insulate a party from Rule 11 sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S. Ct. 2447, 2455, 110 L. Ed. 2d 359 (1990). After the answer or response is served, a plaintiff can be voluntarily dismissed from the action only upon the filing of a stipulation of dismissal under RCFC 41(a)(1)(B), or by court order under RCFC 41(a)(2) "upon such terms and conditions as the court deems proper." RCFC 41(a)(2). In this case plaintiffs' counsel suggested voluntarily dismissing parcel EE after defendant refused to stipulate to the Garcias' ownership and standing. Although defendant did not object to dismissal of the Garcias, the failure to object cannot be interpreted as an agreement to dismissal under RCFC 41(a)(1)(A).

Nevertheless, although dismissal under RCFC 41(a)(1)(A) is not available at this time, the court will permit Henry B. and Rosie R. Garcia's voluntary dismissal under RCFC 41(a)(2). Because the motion to dismiss was made on the eve of trial, and more than six years after the complaint was filed, the court deems this dismissal to be with prejudice as to the claims raised in this lawsuit. Further, dismissal of Henry B. Garcia and Rosie R. Garcia does not operate to relieve the Garcias of liability for any judgment of sanctions, up to the time of trial, that may be rendered against plaintiffs in connection with this court's order to show cause.

II. *Amendment to Change the Parties*

Plaintiffs' motion to amend the complaint to add George Brown, II, Mary Alice Pons, Richard Brown, Daniel Brown and Margaret R. Brown as plaintiffs in this action is allowed. Under RCFC 21, the court may add parties to an action at any stage upon such terms as may be just. RCFC 21; *see also Goodwyn v. Unitd States,* Nos. 91-1575L and 92-120L, 1995 WL 443906 (Fed. Cl. July 26, 1995). These parties were allegedly owners of parcel CC from January 1986 through May 1986; at trial plaintiffs alleged that the taking of this parcel occurred on May 1, 1986. Addition will not prejudice defendant or change the course of the litigation, because defendant has had notice of their claims through their mother, Margaret G. Brown. *See Goodwyn v. United States,* Nos. 91-1575L and 92-120L, 1995 WL 443906 (Fed. Cl. July 26, 1995).

The court further allows plaintiffs' motion to delete Clara V. Persyn, George Verstuyft, Dec'd, Irma Verstuyft, Darson H. Persyn, Dec'd, Clotilde Persyn and Juliana V.

Verstuyft as the alleged owners of parcel Y. Because these individuals remain parties to this action through their ownership of other parcels, the deletion as owners of parcel Y does not effect their liability for any sanctions that might be imposed.

The court notes that at the pretrial conference defendant refused to stipulate to ownership of parcels Y and CC, and plaintiffs' counsel was informed that he would have to prove ownership of these parcels and standing to sue. In the absence of a stipulation, plaintiff's unilateral decision to file a motion to amend the identification of owners of parcels Y and CC did not obviate the requirement that they prove ownership and standing for these parcels.

III. *Dismissal Under RCFC 52(c)*

In this court the judge, rather than a jury, is always the trier of fact. Accordingly, there is no provision under the rules of this court for a "motion for directed verdict," and the court will treat defendant's motion as a motion for judgment under RCFC 52(c).

RCFC 52(c) provides that:

> If during a trial a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained . . . without a favorable finding on that issue . . . .

RCFC 52(c).

The standard for judgment under RCFC 52(c) is not identical to the standard for granting a motion for directed verdict pursuant to Fed. R. Civ. P. 50(a) *Cf. Howard Indus., Inc. v. United States,* 126 Ct. Cl. 283, 288, 115 F. Supp. 481, 484-85 (1953) (lesser standard under former rule 41(b)). On a motion for directed verdict in a jury trial the court does not weight the evidence. Rather it makes all reasonable inferences and resolves all issues of credibility in the plaintiff's favor, and it must deny the motion if a reasonable jury could find in favor of the plaintiff. *See Brady v. Southern Ry. Co,* 320 U.S. 476, 479-80, 64 S. Ct. 232, 234, 88 L. Ed. 239 (1943).

In contrast, on a motion under RCFC 52(c) the judge, as the sole trier of fact, may weigh the evidence and is not required to resolve all issues of evidence and credibility in the plaintiff's favor. *See Howard Indus.,* 126 Ct. Cl. at 288, 115 F. Supp. at 484-85. As the court noted in *United States v. United States Gypsum Co.:*

> When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to [for judgment under Rule 52(c)], to determine merely whether there is a *prima facie* case, such as in a jury trial should go to the jury, when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of facts *when he is himself the trier of facts.* . . . A plaintiff who has had full opportunity to put on his own case and

> has failed to convince the judge,as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term.

United States v. United States Gysum Co., 67 F. Supp. 397, 418 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364, 68 S.Ct. 525, 92 L. Ed. 746 (1948) (quoted in *Howard Indus.*, 126 Ct. Cl. at 289-90, 115 F. Supp. at 485-86).

IV. *Taking of Private Property Without Just Compensation*

A. *The Requirement of a Property Interest*

It is axiomatic that at the threshold of all fifth amendment takings claims plaintiffs must first have a constitutionally protected property interest. *See, e.g., Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S. Ct. 2886, 2901, 120 L. Ed. 2d 798 (1992). Since *Causby v. United States*, it has been well-settled that a landowner's property interest in the land extends to the airspace directly over the propety, to the extent that the airspace can be used to benefit the underlying land. *United States v. Causby*, 328 U.S. 256, 264-65, 66 S. Ct. 1062, 1067-68, 90 L. Ed. 1206 (1946); *see also Lacey v. United States*, 219 Ct. Cl. 551, 553, 595 F.2d 614, 615 (1979). The property interest in the airspace above the land is limited to airspace below navigable limits; there can be no recovery for a taking based on flights within navigable airspace. *Lacey*, 219 Ct. Cl. at 554, 595 F.2d at 616. There is a very limited exception to this rule when the Air Force

consciously selects and imposes an egregious burden on a plaintiff's land, *see generally Branning v. United States*, 228 Ct. Cl. 240, 654 F.2d 88 (1981), *aff'd*, 784 F.2d 361 (Fed. Cir. 1986), which was not pleaded, and is not the case here.

Airspace above 1,000 feet in the congested areas of cities, towns or villages, and 500 feet in uncongested areas, is navigble, or public, airspace, *see* 14 C.F.R. § 91.79 (1982), and the owner of subadjacent land has no claim for compensation for its use. *See, e.g., Lacey*, 219 Ct. Cl. at 554, 595 F.2d at 616. Although counsel for plaintiffs stated unequivocally at the pretrial conference that the properties were located in a congested area, he put on absolutely no evidence at trial to substantiate this claim. Further, based on a pretrial site visit[8] on June 11, 1995, the court finds that the properties involved in this law suit are clearly and unquestionably located in an uncongested area. Therefore, to establish a taking plaintiffs had the burden of proving flights below 500 feet over each property.

B. *Elements and Burden of Proof on a Claim for Taking of an Avigation Easement*[9]

It is well-settled that "[f]lights over private land are not a taking, unless they are so low and so frequent as to

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[8] Counsel for both sides participated in the site visit, as did representatives from the Air Force. Representatives for plaintiffs were invited to attend but elected not to do so.

[9] The court notes that the expression "avigation easement" in a fifth amendment takings case is a term of art. It is not an easement in the generally understood sense of the word. The term is used to describe what the United States takes when low and frequent flights of government aircraft substantially interfere with the use and enjoyment of underlying land.

be a direct and immediate interference with the enjoyment and use of the land." *Causby*, 328 U.S. at 266, 66 S. Ct. at 1068; *see also Lacey*, 219 Ct. Cl. at 553, 595 F.2d at 615; *Speir v. United States*, 202 Ct. Cl. 1020, 1024, 485 F.2d 643, 646 (1973). To establish a taking of an avigation easement, the plaintiff has the burden of proving that within six years of the date the complaint was filed, the United States began flying directly above the subject property, below navigable airspace, and that those flights were of such frequency that they substantially interfered with the use and enjoyment of the underlying land. *Stephens v. United States*, 11 Cl. Ct. 352, 359 (1986); *see also Hero Lands Co. v. United States*, 1 Cl. Ct. 102, 107, 554 F. Supp. 1262, 1266-67, *aff'd*, 727 F.2d 118 (Fed. Cit. 1983), *cert. denied*, 466 U.S. 972, 104 S. Ct. 2346, 80 L. Ed. 2d 819 (1984).

The answer to the question of when a takings claim has accrued requires the court to consider each element as it relates to the unique facts of a particular case. *E.g., Jensen v. United States*, 158 Ct. Cl. 333, 338, 305 F.2d 444, 447 (1962). Avigation easement claims cannot be tried on a "one size fits all" formula. Each element must be established for each parcel, and evidence of a taking over one parcel in a case does not, without more, support a finding of a taking over other parcels. *See, e.g., id.* at 336-37, 305 F.2d at 445-46; *Adaman Mutual Water Co. v. United States*, 143 Ct. Cl. 921, 924-25, 181 F. Supp. 658, 659-60 (1958); *see also Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16, 32-33 (D. Conn.), *supplemented by* 333 F. Supp. 338 (D. Conn. 1971) (formula for damages), *aff'd*, 470 F.2d 148 (2d Cir. 1972), *cert. denied*, *City of New Haven v. Town of East Haven*, 411 U.S. 965, 93 S. Ct. 2144, 36 L. Ed. 2d 685 (1973).

If frequent low overflights over part of a parcel substantially interfere with the use and enjoyment of the land, the government acquires an easement of flight over the entire tract of land at the lowest level frequently flown. *E.g., A.J. Hodges Indus. Inc. v. United States,* 174 Ct. Cl. 259, 266, 355 F.2d 592, 596-97 (1966). The easement applies to all types of planes that do not substantially increase the burden on the underlying land. *See Avery v. United States,* 165 Ct.Cl. 357, 361, 330 F.2d 640, 643 (1964).

Claims against the United States must be brought within six years of the date they accrue. 28 U.S.C. § 2501 (1988 & Supp. V 1993). This requirement is jurisdictional and must be strictly construed. *E.g., Alaska v. United States,* 32 Fed. Cl. 689, 697 (1995) (citations omitted); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 404 (1994) (citations omitted). The complaint in this case was filed on July 15, 1988. Therefore, any claims for a taking before July 15, 1982, would be barred by the six-year statute of limitations.[10] 28 U.S.C. § 2501; *see also Boardman v. United States,* 180 Ct. Cl. 264, 266, 376 F.2d 895, 896-97 (1967), *cert. denied,* 390 U.S. 953, 88 S. Ct. 1046, 19 L. Ed. 2d 1145 (1968); *A.J. Hodges,* 174 Ct. Cl. at 262, 355 F.2d at 594.

Kelly was established as a permanent base in 1917, and jet aircraft have been flying from the base at least since the 1970s. In an effort to circumvent the looming issue of the statute of limitations, plaintiffs argued that their claims did not accrue until the number of overflights reached their highest point. Only then, they argued, could the extent of

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[10]Although it is not relevant to the outcome of this case, the court notes that J.L. and Herminia Guerra needed to prove that the alleged taking occurred after December 6, 1993.

the damage be ascertained. In support of this argument, plaintiffs cited *United States v. Dickinson. Dickinson,* is however, inapplicable to the case at bar. In *Dickinson,* the United States gradually flooded, plaintif's land. *United States v. Dickinson,* 331 U.S. 745, 746-47, 67 S. Ct. 1382, 1384, 91 L. Ed. 1789 (1947). The Supreme Court held that plaintiff could wait to sue until the final consequences of the flooding were apparent, and plaintiff could then determine what had been taken. *Id.* at 749, 67 S. Ct. at 1385. There are several problems with plaintiffs' theory of the time of accrual.

First, *Dickinson* was a flooding case, *id.* at 746-47, 67 S.Ct. at 1383-84, not an overflight case. In *Applegate v. United States,* the court stated that *Dickinson* "set forth the standard for accrual in cases alleging takings of a continual nature." *Applegate v. United States,* 25 F.3d 1579, 1581 (Fed. Cir. 1994). The court went on to explain, however:

> The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by *flooding* when it was uncertain at what stage in the *flooding* operation the land had become appropriated to public use.

Id. at 1582 (emphasis added) (quoting *United States v. Dow,* 357 U.S. 17, 27, 78 S. Ct. 1039, 1047, 2 L. Ed. 2d 1109 (1958)). The Federal Circuit recently reiterated this interpretation of *Dickinson,* noting that "in *Dow,* the Supreme Court 'more or less limited [*Dickinson*] to the class of flooding cases to which it belonged . . .' " *Fallini v. United States,* 56 F.3d

1378, 1381 (Fed. Cir. 1995) (quoting *Kabua v. United States*, 212 Ct. Cl. 160, 165, 546 F.2d 381, 384 (1976), *cert. denied*, 434 U.S. 821, 98 S. Ct. 63, 54 L. Ed. 2d 77 (1977)).

The second problem with plaintiffs' theory is that although a handful of courts have purported to follow the reasoning of *Dickinson* to determine when a cause of action for taking by low overflights accrues, *none* of those courts have held that the number of low overflights must peak before the takings claim accrues. *See Lacey*, 219 Ct. Cl. at 559-60, 595 F.2d at 618-19; *Aaron v. United States*, 167 Ct. Cl. 818, 822-23, 340 F.2d 655, 657-58 (1964); *Aaron v. United States*, 160 Ct. Cl. 295, 299-300, 311 F.2d 798, 800-01 (1963); *Klein v. United States*, 152 Ct. Cl. 221, 223-24, *cert. denied*, 366 U.S. 936, 81 S. Ct. 1661, 6 L. Ed. 2d 847 (1961).

The third problem with application of plaintiffs' "Dickinson stabilizaton theory" for accrual of avigation easement claims is that it would lead to grossly unfair results for many innocent landowners. The necessary corollary to a rule that claims do not accrue until the level of flights has peaked is that claims for the taking of an avigation easement would also not be ripe for review until the number of aircraft operations reaches a "high water mark." *But see Dickinson*, 331 U.S. at 749, 67 S. Ct. at 1385 (Court not called upon to decide if claim would be barred). The United States as sovereign has the right to take private property for public use.The only limit on this right is the requirement that the United States pay just compensation for the property taken. Aggrieved landowners cannot evict the United States; their only remedy is to file suit for compensation under the Tucker Act. Under plaintiffs' "Dickinson stabilization theory," landowners who are deprived of the use and enjoyment of their

property may have to suffer the loss for years before their claim is ripe for review. In theory, the United States could even prevent claims for just compensation from ever ripening by continually increasing the level of intrusion.

For these reasons, the court rejects plaintiffs' argument that *Dickinson* applies in avigation easement cases beyond the general principle that a claim for taking based on continuing acts of physical invasion does not accrue untl the extent of the invasion and the degree of interference is known or should be known. *See Aaron*, 167 Ct. Cl. at 824, 340 F.2d at 659. The overwhelming weight of authority holds that in a case of a taking by low overflights, the extent of the invasion and the degree of interference is ascertainable when the United States *begins* to operate its aircraft at low elevations and with such frequency that they substantially interfere with the use and enjoyment of the land, with the intent to continue such flights indefinitely. *See, e.g., A.J. Hodges,* 174 Ct. Cl. at 265-66, 355 F.2d at 596. To constitute a taking, it is not necessary that the flights continue for a precise period of time. *See, e.g., Speir,* 202 Ct. Cl. at 1024-25, 485 F.2d at 646-47; *Aaron,* 160 Ct. Cl. at 299, 311 F.2d at 800-01; *Klein,* 152 Ct. Cl. at 224; *Matson v. United States,* 145 Ct. Cl. 225, 229, 171 F. Supp. 283, 286 (1959).

C. *Plaintiffs Failed to Prove a Taking by Low Overflights*

1. *Parcel A*

Parcel A is a 23.59 acre parcel to the southeast of KAFB; it is located in APZ1 and APZ2 for runway 15/33. In addition, it is located in the APZ zones for runway 14/32.

Plaintiff Clotilde Persyn and her husband Darson Persyn (now deceased) moved onto parcel A on May 1, 1935 and used the property as a residence and for farming. After Mr. and Mrs. Persyn moved onto parcel A, it was intersected by the Laredo Highway. The property is improved by a house and barn, both are located on the south side of the Laredo highway.

Mrs. Persyn's testimony, that aircraft fly between her house and the barn, and right over her head, was sufficient to support a finding that aircraft from Kelly fly directly over parcel A on takeoff and landing. Further, testimony regarding objects which have fallen on parcel A over the years, from before World War II, is also credible evidence that aircraft pass directly over parcel A.

Although plaintiffs established flights directly over parcel A, there was no credible objective evidence that the aircraft flying over parcel A did so at altitudes less than 500 feet. Although Mrs. Persyn alluded to flights of the "shuttle"[11] and the C-5A rigaht over her head, this testimony was insufficient evidence of the altitudes of those planes. A court should not accept the uncorroborated testimony of a plaintiff that aircraft flew at elevations of less than 500 feet to prove that flights were below navigable airspace because of the difficulties in determining the altitude of a plane from the ground. *Aaron,* 160 Ct. Cl. at 315 (opinion of Commissioner). Mr. A.C. Lopez also testified that when he visited his mother at her home on a nerby parcel, the C-5A flew over

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[11] It was not clear from the testimony to what "shuttle" Mrs. Persyn was alluding, though the court suspects it was the NASA space shuttle that is transported cross-county on the back of a C-5A.

at such low altitudes that he could see its "nuts and bolts." With the assistance of plaintiffs' counsel, he subsequently changed this testimony to state that he could see "rivets." Based upon its obsesrvations, the court was insufficiently satisfied with Mr. Lopez's credibility to accord weight to his testimony.

The only other "evidence" of the altitude of aircraft came from a dubious exercise performed by Kirby Gholson, plaintiffs' totally discredited appraiser. Plaintiffs' counsel at one point offered Gholson as an expert mathematician to "calculate" the height of triangles with bases of 3,000 feet, 8,000 feet and 15,000 feet, assuming two-and-one-half and three degree angles. The angles used were based on a 1981 AICUZ study that alternately referred to the "glide slope angle," the "glide slope" and the "angle." The terms "glide slope" and "glide angle" are, however, not interchangeable. The glide slope refers to "the downward path an airplane is directed to follow when it cannot see the ground and is landing on instruments." *Dick v. United States,* 144 Ct. Cl. 424, 426, 169 F. Supp. 491, 493 (1959). In contrast, the glide angle is the "minimum angle of approach with any degree of safety. Airplanes never fly this low unless they are in trouble and cannot help it." *Id.* at 427, 169 F. Supp. at 493. It is not clear whether the 1981 study is referring to the glide slopes or the glide angles, and there was no testimony, expert or otherwise, on this issue to assist the court. Further, the glide slope and the glide angle are only spplicable when an aircraft *approaches* a runway to land; neither has any bearing on the altitude of an aircraft on takeoff. *See id.* at 426-27, 169 F. Supp. at 493. Because of prevailing winds, however, only twenty to thirty percent of the flights over parcel A are landings. As to the remaining seventy to eighty percent of

flights, plaintiffs' purported mathematical exercise had absolutely no bearing whatsoever.

Moreover, even as to the landings, there was no evidence that the glide angles in the 1981 study were applicable to all aircraft types, *compare id.* at 433 (finding of fact that approach angle is determined by characteristics of aircraft), on all missions, *compare Lacey,* 219 Ct. Cl. at 558, 595 F.2d at 618 (different altitude for "touch and go" and "filed carrier landing practice" patterns), or whether aircraft using these glide angles followed a straight line descent.

Even if this court could believe Gholson's demonstration, there was no evidence whatsoever to establish the starting point for this calculation, i.e., where did the angle originate-at the end of the runway or in the middle. *Compare Jensen,* 158 Ct. Cl. at 354 (finding of fact that normal practice for B-47 on touch and go exercise is to land 3,000 feet from end of runway). The only certainty in this formula is that aircraft do not regularly land, or take-off, at the very end of a runway.

Further, even if the court knew at what point each aircraft model touches down on landing at KAFB, in the absence of evidence establishing the distance of each parcel from this point, plaintiffs' calculations are without context. Parcel A is located partially in APZ1 which begins and ends 3,000 feet and 8,000 feet from the end of runway 15/33. There was no evidence, however, establishing the distance from the point at which aircraft first pass over parcel A to runway 15/33.[12]

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[12] Mrs. Persyn did testify that the parcel is "about" one mile south of Kelly.

There was also no attempt made to show that the glide angles in the 1981 study were relevant to aircraft operating at any time after 1980. Even if the court were willing to make all the assumptions required to make Gholson's demonstration valid, however, it would necessarily have to conclude that aircraft landing at Kelly after July 15, 1982 did not fly at lower altitudes than aircraft arriving at kelly before July 15, 1982.

Finally, plaintiffs also did not show the kind of egregious circumstances that led the court in *Branning to find a taking even though flights were not below navigable airspace. In Branning,* heavy jet aircraft were flown nose to tail in a racetrack pattern, at maximum power, over plaintiff's land. *Branning,* 228 Ct. Cl. at 242, 654 F.2d at 90. Although the Air Force could have performed this maneuver somewhere else, it decided not to do so. *Id.* at 242, 654 F.2d at 90. The court in *Branning* noted that its finding of a taking "turn]ed] on the peculiar facts the trial judge has found." *Id.* at 242, 654 F.2d at 90; *see also Stephens,* 11 Cl. Ct. at 360. The flights that form the basis of the claims in this case are ordinary takeoffs and landings by single aircraft; there was no allegation or evidence of any racetrack patterns performed by multiple aircraft. Althought it is within the realm of possibility that the approach and landing patterns could be varied slightly, the Air Force cannot be said to have "consciously singled out" plaintiffs' lands in the same sense as occurred in *Branning.*

Even if the evidence established the flights over parcel A were below 500 feet (and ignoring for the moment the statute of limitations problems with respect to the height of the planes), the United States is not liable for the taking

of an avigation easement based on occasional flights only. *See, e.g., Mid-States Fats & Oils Corp. v. United States,* 159 Ct. Cl. 301, 309 (1962). There is no set formula to determine when flights by an aircraft become sufficiently "frequent" to trigger a taking, and the number of aircraft must be considered in light of the type of aircraft flown. *See Brin v. United States,* 159 Ct. Cl. 332, 335-36, 339-40 (1962); *see also Lacey,* 219 Ct. Cl. at 559, 595 F.2d at 618-19; *Aaron,* 160 Ct. Cl. at 299, 311 F.2d at 800-01; *Highland Park, Inc. v. United States,* 142 Ct. Cl. 269, 270-71, 161 F. Supp. 597, 598-90 (1958). Although different aircraft models were used at Kelly over the years, there was no evidence of the differences between the aircraft such as the number of engines, the maximum thrust, the aircraft load or the noise generated by each model as it passed overhead. *Compare Lacey,* 219 Ct. Cl. at 557, 595 F.2d at 617 (F-9 aircraft generates 7,250 lbs of thrust and 108 decibels of noise when passing overhead at 1,000 feet).

At trial Mr. Miller was permitted to read to the court, from a document he did not prepare, that there were 221,688 total landings and takeoffs from Kelly in fiscal year 1967. Counsel for plaintiffs did not even attempt to authenticate the document in any way, and it was not introduced into evidence. Accordingly, the court attaches no weight to this testimony. Plaintiffs also produced a 1975 AICUZ study that reported fifty-two sorties per day for the principle aircraft using Kelly in the year ending October 1973. Because a sortie is a total flight-mission, and may include a number of operations, this information has no usefulness in the absence of supporting and explanatory testimony or evidence, which counsel for plaintiffs did not proffer.

A 1981 AICUZ study was introduced into evidence.

According to that study there were approximately 115,528.4 operations, assuming a five day week, from Kelly in 1980. Although there were two active runways at Kelly in 1980, eighty percent of the flight activity was from runway 15/33. Further, although runway 14/32 was used twenty percent of the time, its south APZs overlapped the south APZs for runway 15/33. Therefore, as to parcel A, which is located to the southest of Kelly, it was immaterial whether the aircraft used runway 15/33 or 14/32. In both cases, the flights were over parcel A. As the court has previously noted, seventy to eighty percent of these flights are takeoffs and twenty to thirty percent occur on landing. If the court assumes that half of the total operations were over the north APZs and half were over the south APZs, there were 57,764.20 operations in 1980 over parcel A. The court notes that this number of operations by jet aircraft is far more than the minimum needed to trigger a taking. *Compare Aaron,* 160 Ct. Cl. at 299, 311 F.2d at 800 (taking based on ten to twelve flights per day).

Plaintiffs offered absolutely no evidence at trial of the number of operations at Kelly in 1981 or 1982. A 1984 EA reported 67, 585 operations in 1983, half of which could have been over parcel A. Subsequent to 1983 figures, there was no evidence of actual operations. Instead, defendant produced, without objection, a 1986 EA that projected 89,588 operations after sixteen C-5As were delivered to the 433d MAW.[13] Even if the court assumes the 89,588 operations listed in the

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[13] The court notes that the number of operations were listed in a table titled "Current Aircraft Operations," and the EA states that "[c]urrent average daily operations are summarized in Table 3.1." AIR FORCE LOGISTICS COMMAND, U.S. DEP'T OF THE AIR FORCE, ENVIRONMENTAL ASSESSMENT 31 (1986). The EA also states that "[t]he operations summarized in Table 3.1 represent the projected number of operations that would occur on an average busy day when the 433d MAW has received the total of 16 C-5A aircraft currently programmed." *Id.*

1986 EA represented actual operations, an assumption the court is unwilling to make, however, only 44,794 would have been over parcel A.

Based on the lack of evidence of the number of aircraft opertions at Kelly, the court cannot make any findings regarding the frequency of flights. Nevertheless, the court notes that the limited evidence proffered by plaintiffs directly contradicts plaintiffs' own claims that the number of aircraft operations peaked after July 15, 1982. To the extent plaintiffs' evidence of the number of flights over parcel A has any relevance, the court must conclude that by 1981 at the latest, there were sufficient flights by jet aircraft over parcel A to trigger the takings clause.

In order to have a compensable taking, the noise and disturbance from frequent low flying planes must substantially interfere with the use and enjoyment of the underlying land. *See Causby,* 328 U.S. at 261, 66 S. Ct. at 1066; *Bodine v. United States,* 210 Ct. Cl. 687, 688 (1976). Plaintiffs argued that even though parcel A has been located in the shadow of a busy Air Force base for over thirty years, there was no substantial interference from overflights until after July 15, 1982.[14] The Court should not give decisive weight to unsupported allegations made by interested parties that flights of aircraft did not interfere substantially with the use and enjoyment of the land until after July 15, 1982. *Jensen,* 158 Ct. Cl. at 339, 305 F.2d at 447. Nevertheless, to the extent these allegations are "consistent with [any]

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[14] Actually, plaintiffs took the position that there was no interference before 1985 or 1986. Because July 15, 1982 is the relevant date for statute of limitations purposes for the majority of plaintiffs, the court has used that date in its analysis.

known objective facts [such testimony should] be given considerable weight, particularly in the absence of adequate countervailing proof that there was actually a greater effect from these flights than plaintiffs admit." *Id.* at 339, 305 F.2d at 447.

As the court previously noted, parcel A has been used as a residence and farm since at least 1935, and it is improved by a house and barn. The Persyns farmed the land themselves until Mr. Persyn became ill. Since that time, the land has been rented for agricultural use to a person who was not identified at trial. Clotilde Persyn continues to live on parcel A.

There was no evidence that overflights of aircraft from Kelly have had any impact on the agricultural use of parcel A. *Compare Causby v. United States,* 104 Ct. Cl. 342, 349, 60 F.Supp. 751, 755 (1945) (noise from low flying aircraft caused chickens on chicken farm to fly into wall and die), *rev'd on other grounds,* 328 U.S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946). Although Mrs. Persyn testified that it was no longer profitable to use parcel A for farming, she attributed this fact to its relativaely small size rather then interference from aircraft. *Compare A. J. Hodges,* 174 Ct. Cl. at 269-70, 355 F.2d at 599 (noise from low flights of B-52 interrupted farm work).

There was evidence that parcel A is subject to a statistically greater risk of accidents from aircraft flying overhead than land not located in the approach zone of an airport. If this factor were linked to frequent and low overflights, it would be a consideration in determining whether there has been substantial interference. In this case, however, there was no evidence to link the risk of accidents to low

flying aircraft. Further, even if the risk of accidents could be attributed to frequent low level flights, it is clear the risk existed long before July 15, 1982, and there was no evidence that the risk increased after that date. *See Boardman,* 180 Ct. Cl. at 270, 376 F.2d at 899 (no reason to believe risk of accidents varies with height, type, number or noise of aircraft). Mrs. Persyn highlighted this fact by recalling that two planes collided over parcel A during the 1930s. The pilot was killed in the accident and his body, along with his helmet that had been shredded by the propeller, was found amid the muddy irrigation fields. Further, through the years, numerous items, including a canopy in 1966, have fallen from aircraft passing over parcel A. There was no testimony that any items fell on parcel A, or any aircraft crashed over or on parcel A, after 1982.

To the extent that the noises levels on parcel A were caused by frequent low overflights, these high noise levels adversely affected the use and enjoyment of parcel A as a residence. Based on the objective evidence, however, the court is forced to conclude that noise substantially interfered with the reesidential use and enjoyment of parcel A at least by 1981.

Day Night Average Sound Levels (DNL) are a measure of the external noise environment at a particular location. *See* C.F.R. § 51.103 (1995). DNL sound levels include an adjustment for the number of single noise events and the time of day of those events. Under government standards in effect in April 1982 land that was either partially or completely in areas with sound levels exceeding 65 DNL was generally considered unsuitable for residential use. *See, e.g.,* 24 C.F.R. § 51.104 (1982). The mere fact that a property is subject

to high noise levels as a result of aircraft operations will not establish liability for a taking if there is no showing that the noise is caused by frequent and low overflights. *See Branning,* 228 Ct. Cl. at 252, 654 F.2d at 96. If the remaining elements of a taking are established, however, evidence of high noise levels will be relevant to determine whether there has been substantial interference with the use and enjoyment of the land. *Id.* at 252, 654 F.2d at 96.

In 1980 noise levels on parcel A ranged from 75-80 DNL. Because there was no credible evidence of the altitude of aircraft as they passed over parcel A, the court is unable to conclude that there was a taking. The court notes that if plaintiffs had established that the noise levels on parcel A were caused by aircraft as they flew low over the property, the takings claim for parcel A would have accrued by 1981 at the latest.

2. *Parcel B*

Parcel B consists of 3.185 acres of a larger 19.433 acre tract. The portion of the tract that is part of this lawsuit is in the southwesternmost corner of APZ2. The extended centerline of the runway does not cross parcel B at any point. Damage to property from flights that are not directly over the land are not compensable under the takings clause; rather, "the inconvenience and injury to the property [is] 'incidental' and 'unavoidably attendant' to the use of the airways." *Avery,* 165 Ct. Cl. at 362, 330 F.2d at 643 (citations omitted); *see also Batten v. United States,* 306 F.2d 580, 585 (10th Cir. 1962) (in absence of invasion of airspace directly over property, "distinctions which the Supreme Court has consistently made between "damages" and "taking" control

and compel denial of recovery"), *cert. denied*, 371 U.S. 955, 83 S. Ct. 506, 9 L. Ed. 2d 502 (1963); *Town of East Haven*, 331 F. Supp. at 31-32. The cases in this court do not establish a test for when flights can be considered "directly" over property. In *Town of East Haven*, however, the court applied a test of reasonableness, noting that planes were "pass[ing] so very close to these properties, if not directly over them, as to make it seem like unrealistic nitpicking to deprive these plaintiffs of the benefit of the *Causby* rule." *Town of East Haven*, 331 F. Supp. at 33.

Parcel B is located in APZ2 south, and Mildred Baecke testified that there were flights over this property. Because the APZs are 3,000 feet wide, at its closest point parcel B is necessarily within 1,500 feet of the center line of runway 15/33. Runway 15/33 is only 300 feet wide, however, and no evidence was introduced regarding the distance of parcel B from the runway center line, the flight paths of aircraft on takeoff or approach, the degree (if any) of deviation from the center line of the runway on takeoff or landing, or the wingspan of aircraft flying to and from KAFB. *Compare Dick*, 144 Ct. Cl. at 434 (finding of fact that wingspan of B-47 is 116 feet; wingspan of KC-97 is 141 feet). In light of the distance of parcel B from the base and the center line of the runway, the court notes that the evidence of flights directly over the property is not very compelling. Nevertheless, for the purposes of this opinion the court assumes that aircraft flying north toward Kelly and south from Kelly, fly "directly" over parcel B.

Even if the court assumes that flights to and from Kelly were directly over parcel B, plaintiffs' claim for a taking of airspace over parcel B must fail for several reasons. First,

as with parcel A, there was no credible evidence of the height of aircraft flying over parcel B. The court notes that at its closest point parcel B was almost 15,000 feet from the south end of runway 15/33. Even under Kirby Gholson's skewed demonstration (to which the court attaches no weight for the reasons given above), aircraft approaching Kelly over parcel B would have been at altitudes far greater than 500 feet.

Further, as with parcel A, the minimal evidence available of the frequency of flights, if believed, would establish that the number of operations was sufficient to trigger the takings clause of 1981, and actually *decreased* in 1982 and thereafter. In addition, from 1952 until 1994 Mildred and Florent Baecke lived in a house located on the portion of the 19,433 acre tract that is outside this suit. Although they owned the land that the house was situated on, they did not own the remainder of the tract, including paracel B, until 1985 when Mr. Baecke inherited the land from his parents. It appears from the evidence at trial that parcel B was used for agricultural purposes by Mr. Baecke's parents. As with parchel A, there was no evidence that overflights from aircraft had any impact on the use of parcel B for agricultural purposes.

Like parcel A, parcel B has been subject to high noise levels for a number of years, although to a lesser extent. In 1971 Mr. Baecke's parents tried to sell parcel B along with other land that is not part of this suit but is part of the larger tract. The sale was canceled after the Federal Housing Administration (FHA) notified the buyer that FHA financing would not be available due to high noise levels. Moreover, in 1980 noise levels on parcel B were in excess of 70 DNDL. Therefore, the court finds that the highest and best use of

parcel B was something other than residential by 1981.

3. *Parcels J and K*

Parcel J is a 15.874 acre parcel located to the southeast of KAFB; it is located in APZ2 south. Parcel K is part of a 8.79 acre parcel located to the southeast of KAFB; 8.099 acres are located in APZ2 adjacent to parcel J. 4M Properties purchased parcel J in October 1984. In February 1985 Terry Britton purchased parcel K in partnership with Somerset Joint Venture. Because 4M Properties, and Terry Britton and Somerset Joint Venture, did not own the subject properties until October 1984 and February 1985, none of those parties have standing to sue for any taking that might have occcurred before those dates. *See, e.g., United States v. Dow,* 357 U.S. 17, 20, 78 S. Ct. 1039, 1043-44, 2 L. Ed. 2d 1109 (1958).

The only testimony at trial regarding flights directly over parcel J and K came in response to a question on cross examination. On cross examination Mr. Britton was asked whether, before purchasing parcels J and K, he anticipated that aircraft taking off and landing at Kelly would fly over the properties. His response was, "Yes, he did anticipate such flights prior to purchase. Although the paucity of evidence offered on this issue was indicative of the manner in which this entire case was tried, the court assumes for the purpose of this analysis that aircraft from Kelly flew directly over parcels J and K. Because parcels J and K located south of Kelly, approximately seventy percent of these flights would have occurred on takeoff.

Even if the court assumes that the flights from Kelly were directly over parcels J and K, however, plaintiffs' claims

for a taking of airspace over these parcels nevertheless must fail. First, as with parcels A and B, there was no evidence of the height of aircraft as they took off over parcels J and K, and the only evidence of the distance of the parcels from the base was testimony that the parcels were approximately two miles from Kelly. Second, the only evidence, credible or otherwise, regarding the altitude of the thirty percent of the landings over parcels J and K required a finding that aircraft were approaching Kelly at the same altitudes before and after 1980. Third, the limited evidence of the frequency of flight suggested that the number of operations was higher in 1980 than at any time thereafter.

In addition, there was no evidence that the overflights affected the highest and best use of the parcels. 4M Properties purchased parcel J with the intent of subdividing it for light industrial use; Terry Britton and Somerset Joint Venture purchased paracel K for the same purpose. In connection with the sale, zoning was changed from B residential to I-1 light industrial, and 4M signed a memorandum of understanding limiting the use of the property. At the time of purchase, the highest and best use of parcels J and K was for light industrial. Plaintiffs did not prove that aircraft that began flying over these properties after 1984 substantially interfered with the enjoyment and use of parcels J and K for industrial purposes. Although there was speculation that Sea World declined to purchase nearby land because of high noise levels, Sea World in no way can be considered a "light industrial" enterprise. The court notes that the high noise levels on parcels J and K (in excess of 70 DNL) predated 4M and Terry Britton's ownership.

Although 4M and Mr. Britton's expectations of develop-

ing J and K were apparently not fulfilled, plaintiffs did not establish that this was due to low level overflights. The evidence at trial indicated that the time of purchase the mayor of San Antonio was trying to stimulate development in the south part of the city because it was growing at a slower rate than the rest of San Antonio. After 1984 there were major changes to the federal tax code. These changes impacted the national as well as the local real estate market. Further, the savings and loan industry entered several disastrous years after Terry Britton and 4M purchased J and K, and credit was nonexistent. Although Mr. Britton acknowledged that the real estate market was "dead" in the entire city of San Antonio for 1986[15] to 1990, he maintained, incredibly, that these factors did not contribute to any decline in value for the subject parcels. Rather, he maintained that the allegedly flat market in the APZ zones during the same period was caused by ovearflights. The court notes that even if Mr. Britton's credibility had not previously been diminished by some of his testimony on cross-examination, his unwillingness to credit the possibility that the subject parcels could be affected by the same factors as the rest of the country rendered his testimony on this issue unbelievable.

4. *Parcels N and O*

Parcel N is currently owned by Mr. Raymond Wauters. It is part of a 24.17 acre parcel located southeast of KAFB; 14.794 acres are located in APZ2. Raymond and Lorraine Wauters also own parcel O which is a half acre tract located in APZ2 southeast of KAFB. There was no testimony at trial of flights directly over parcels N or O. If the court assumes

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[15] At trial plaintiffs took the position that the alleged taking claim accrued on May 1, 1986.

that flights necessarily are over these parcels because they are located in APZ2, it still must conclude that plaintiffs failed to prove that the United States took an avigation easement.

First, for the reasons detailed above, the court finds that there was no credible evidence that aircraft landing over paracels N and O did so below navigable airspace, and no evidence at all that aircraft taking off over parcels N and O flew below navigable airspace. Because parcels N and O are located south of Kelly, at least seventy percent of these flights over these properties were takeoffs. Second, the limited evidence available indicates that the number of flights over parcels N and O was sufficient to activate the takings clause by 1981, and decreased thereafter. Third, there was no evidence from which the court could determine how parcels N and O are used or have been used in the past. Although Mr. Raymond Wauters testified that he believed the value of parcels N and O were linked to frequent low level flights. To the extent that plaintiffs suggest that the Air Force is liable for a taking if it informed the public about noise levels and accident potential in the APZ zones, this claim is without merit. The Air Force "can be said to be vigilant, aggressive, and perhaps more, but it cannot be said that supplying information on an assertedly hazardous situation constitutes a "taking" of property within the fifth amendment." *Bodine,* 210 Ct. Cl. at 689 (similar takings case against the Navy for low level flights).

Even if plaintiffs had extablished a link between noise levels on the subject properties and low level overflights, it is clear that by 1981 parcels N and O were unsuitable for residential use. Noise levels on parcel N were in excess of

70 DNL in 1980, and noise levels on parcel O were greater than 75 DNL. Therefore, if plaintiffs had established a link between the other elements of a takings claim and the noise levels, any claim based on interference with residential use of parcels N and O would have accrued no later than 1981.

5. *Parcel S*

Parcel S is a 1.187 acre tract located southeast of KAFB in APZ2 and is currently owned by Roger and Patricia Verstuyft. Based on the testimony of Mrs. Verstuyft and the location of the parcel, the court is satisfied that flights from Kelly are directly over this property. Because parcel S is located south of Kelly, approximately seventy percent of these flights would have occurred on takeoff.

Although there was evidence of flights directly over parcel S, there was no credible evidence of the height or frequency of aircraft flying over parcel S. Further, the limited evidence available indicates that since 1980, the height of aircraft on approach has not decreased, and the number of aircraft has not increased. Therefore, the court concludes that plaintiffs failed to prove a taking after July 15, 1982. Further, although Patricia Verstuyft testified that tract S was "not suitable for human habitation" because of overflights by the C-5A, it is clear that by 1981 at the latest that condition attached to the land, and tract S did not have a highest and best use as resdential property.

6. *Parcel U*

Parcel U is part of a 24.283 acre tract located southeast of KAFB; 20.317 acres are located in APZ2. parcel U is owned

jointly by Irma Verstuyft, Roger Verstuyft, Marvin G. Verstuyft and Sharon E. Eisenhauer. There was no evidence of flights directly over this parcel and below navigable airspace. Further, the limited evidence of operations contradicts plaintiffs' claim that the number of operations increased after 1982, and there was no evidence on the use of parcel U before or after July 1982. To the extent Mrs. Verstuyft intended to refer to tract U as well as tract S, when she stated that her land was not suitable for human habitation, the court notes that noise levels on parcel U ranged from 70-80 DNL in 1980, and most of the land had sound levels greater than 75 DNL. Therefore, by 1981 the highest and best use of parcel U was something other than residential.

7. *Parcel V*

parcel V is part of a 26.147 acre tract located southeast of KAFB of which 19.373 acres are on the edge of APZ1 and APZ2. Parcel V is currently owned by mildred V. Baecke and Alene Buys. Mildred Baecke testified that while she lived on parcel V during the 1960s, aircraft flew "over" the property, but she did not "pay any attention" to them because she was young. Mrs. Baecke also testified, however, that she lived on tract B from 1952 until 1994. The court does not suggest or conclude that the contradictions were caused by a deliberate effort to mislead the court; rather, the court attributes the contradictions to plaintiffs' counsel's spurious, leading, and confusing questions. Nevertheles, the court was unable to accord weight to her testimony of flights directly over parcel V because of these contradiction in her testimony and admitted gaps in her perception of event.

Even if the court credited Mrs. Baecke's testimony

about flights over paracel V, however, it still must conclude that plaintiffs did not prove a taking of the airspace because the only evidence of the altitude of the aircraft and the frequency of flights suggests that any claim would have accrued no later than 1981. Further, although there was evidence that parcel V was used for residential purposes until at least 1952, there was no evidence of its use after that date. To the extent plaintiffs allege parcel V lacked value for residential purposes after July 1982, the court notes that in 1980 noise levels on parcel V ranged from 70-80 DNL; most of the land had sound levels greater than 75 DNL, rendering the land not compatible with residential use.

8. *Parcel Y*

Parcel Y is a one acre water retention pond. As with many of the subject parcels, noise levels on this property are very high; in 1980 they ranged from 75-80 DNL. Although these levels would be incompatible with residential use, the court does not perceive any interference with the use and enjoyment of this property as a pond. Therefore, on the facts of this case there could be no taking of an avigation easement over parcel Y even if there were low and frequent flights directly over this land.

9. *Parcel BB*

Parcel BB is a 4.358 acre tract located southeast of KAFB in APZ1, A.C. Lopez obtained title to parcel BB by warranty deed dated June 7, 1984. Although there was no direct testimony regarding flights over parcel BB, the close proximity of parcel BB to parcel A, coupled with testimony of flights over an adjoining lot was sufficient to support a

finding of flights directly over parcel BB.[16] Nevertheless, because the court was unable to credit Mr. Lopez's testimony regarding the height of aircraft passing over parcel BB, *see supra*, and because in any event plaintiffs failed to establish that low frequent flights began after June 7, 1984, Mr. Lopez's claim for the taking of an avigation easement must fail.

Even if these elements were established, plaintiffs failed to prove that overflights after 1984 substantially interfered with the use and enjoyment of parcel BB. Although Mr. Lopez testified that he was unable to develop or sell the property, it was clear from his testimony that he attributed the cause to a zoning change that went into effect on May 1, 1986, rather than overflights from aircraft. In additon, by the time Mr. Lopez purchased tract BB in 1984, the property was already subject to noise levels in excess of 75 DNL, rendering it incompatible with residential use. The court also notes that at the time Mr. Lopez obtained titled, parcel BB was subject to a flight easement recorded in Volume 4061, page 501 Deed Records of Bexar County, Texas. There was no evidence of the extent of this easement.

10. *Parcel HH*

Parcel HH is part of a 48.123 acre parcel located northwest of KAFB; 43.352 acres are located in APZ2 north. Plaintiff Terry Britton purchased parcel HH on or about 1980 and sold it in 1984 to Robert Cadena, Joh Miller and the Comcal Group.

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[16] Although the court is satisfied with the proof on this particular element, the witness who testified regarding parcel BB was far from being completely credible on all issues.

At the time Mr. Miller purchased tract HH, approximately twenty percent of the operations from Kelly used runway 14/32. Because tract HH is located to the northwest of Kelly, aircraft using runway 14/32 did not fly directly over parcel HH. In 1985 or 1986 runway 14/32 closed. At that time traffic previously routed over runway 14/32 began flying from runway 15/33 and, therefore, over parcel HH Nevertheless, to the extent the court is able to rely on the limited data provided by plaintiffs, it is clear that the number of flights over parcel HH was greater in 1980 than at any time thereafter. In 1980 there were at least 115,528.40 operations from Kelly. Eighty percent or 92,422.20 used runway 15/33. Half of that number, therefore, would have been over parcels to the north, and half would have been over parcels to the south. Therefore, there were approximtely 46,211.36 flights over parcel HH in 1980, and in 1983 there were 27,034 such operations (half of eighty percent of total operations). After 1986 there was only one runway at Kelly. Even if there were 89,588 operations at Kelly in the years after 1986, only half of those, or 44,794, would have overflown parcel HH. Therefore, based on the limited evidence provided, the court can only conclude that more aircraft flew over parcel HH in 1980 than at any time thereafter. The court notes that Mr Miller testified that there were over 200,000 operations in 1967. Although the court has not assigned any weight to this unsubstantiated testimony, it would support the court's finding that the number of operations decreased after 1980.

In addition, as the court has previously noted, there is no evidence that aircraft began flying at lower altitudes after 1980. The court finds that there is no evidence that aircraft from Kelly began to substantially interfere with the use and enjoyment of parcel HH after 1984. At the time of purchase

tract HH was zoned light industrial. In March 1985 the Mexican American Unity Council, Inc. obtained an option to purchase tract HH. The option expired if not executed by October 31, 1985. Under the terms of the option, the buyer had the right to cancel the option at any time during its term in the event the property did "not prove satisfactory for Buyer's intended use, in Buyer's sole discretion and opinion." Prior to October 31, 1985, the Mexican American Unity Council, Inc. elected not to exercise its option to purchase tract HH. allegedly because the project would have required extensive noise abatement treatment. The court notes that noise levels for parcel HH were in excess of 70-80 DNL in 1980. Therefore, even if this limited evidence was sufficient to establish that high noise levels from low flying aircraft interfered with the use and enjoyment of parcel HH it would appear that such a claim is outside the statute of limitations. Further, Mr. Miller and Mr. Cadena do not have standing to maintain takings claims arising before they owned the subject property.

11. *The Remaining Parcels*

With respect to parcels C, D, E, F, G, H, I, L, M, P, Q, R, T, W, X, Z, AA, CC, DD, FF, GG and II, there was no evidence regarding flights directly over these parcels, or the altitude or number of such flights. Further, there was no evidence of the use of the parcels before or after July 1982. *Compare Robertson v. United States,* 173 Ct. Cl. 621, 624, 352 F.2d 539, 540-41 (1965) (land used for grazing cattle and producting oil). The court notes, however, that in 1980, noise levels for parcels C, D, E, F, G, H, I, L, M, P, Q, R, T, GG and II were in excess of 70 DNL; noise levels for parcels W, X, Z, AA, CC and FF were in excess of 75 DNL; noise levels

for parcel DD exceeded 80 DNL. Therefore, by 1981 none of the above parcels had a highest and best use as residential properties.

D. *Plaintiffs Do Not Have A Claim for an Additional Taking*

Although plaintiffs failed to establish that aircraft flew directly over the subject parcels, or the altitude or number of such aircraft, and interference with the use and enjoyment of those parcels, prior to trial it appeared possible that plaintiffs might have a colorable claim based on flights by the C-5A aircraft. In pretrial filings, plaintiffs alleged that the C-5A was an immense, noisy aircraft that began flying sometime after 1984 or 1985, and made an already bad situation worse. If plainiffs had established the basic elements of a taking, they might have recovered for an additional takings based on flights of the C-5A if they had also shown that after July 15, 1982:

> [T]he nature and degree of the disturbance to private property rights in approach zones below the line of flight [was] substantially worsened and rendered intolerable by the use of aircraft which, because of their size, power, noise, altitude and flight characteristics, or because of structural changes in the airport layout, imposed[d] a greater degree of interference in the enjoyment of property over which they pass en route to or from their operating runways than the conditions which previously inhered . . . .

Boardman, 180 Ct. Cl. at 271, 376 F.2d at 899. In the case of a taking of an additional easement, "a significant deprecia-

tion in the market value of the property as a direct result of the overflights is not only a prerequisite to recovery of just compensation but also marks the date of taking from which applicable statutes of limitation commence to run and valuations for damage purposes are to be measure." *Id.* at 271, 376 F.2d at 890; *see also Avery,* 165 Ct. Cl. at 361, 330 F.2d at 643.

Unfortunately, as with virtually every aspect of plaintiffs' case, any claim for an additional taking based on the C-5A was frustrated by a total lack of credible evidence. First, although plaintiffs alleged that the C-5A was introduced after July 15, 1982, there was no evidence, credible or otherwise, of the actual number of flights by the C-5A. The 1984 EA projected that sixteen C-5As would be delivered to the 433d MAW, but this was merely a projection; it is not evidence of what actually occurred. Further, according to the 1986 EA, only five C-5As arrived. Although the 1986 EA estimated that when the sixteen C-5As arrived they would conduct twenty-one operations per day, there was no evidence that more than five C-5As were ever delivered to the 433d MAW, or of the number of operations performed by those five C-5As. In the absence of evidence, the court attaches no weight to the unsupported allegations of a few plaintiffs that flights by the C-5A increased after 1985. Although not dispositive on the facts of this case, the court notes that the twenty-one predicted operations by the C-5A would have amounted to only six percent of total operations.

Further, the court notes that there were C-5As at Kelly before 1982. The United States Air Force received its first C-5A in December 1968. JANE'S ALL THE WORLD'S AIRCRAFT 378 (John W.R. Taylor ed. 1975-76). As early as 1973

there was at least one C-5A stationed at Kelly, and by 1973 the SAALC was the logistic support manager for the Military Aircraft Command's C-5A Galaxy jet transport fleet. The C-5As were flight tested in conjunction with depot maintenance at KAFB. By May 1973 theAir Force had received eighty-one C-5As. *Id.*

In addition, although the C-5A is indeed a huge aircraft, there was no evidence that the C-5A is substantially noisier than other aircraft flying in the skies above plaintiffs' properties. The court finds it significant that the Air Force made a finding of No Significant Impact with respect to the proposal to add sixteen C-5As to Kelly's aircraft fleet. In addition, the 1986 EA actually reported a slight decrease over 1980 noise levels. Further, there was no evidence to support a finding that there was a greater risk of accidents from the C-5A than from other aircraft.

Finally, there was no credible evidence of a significant drop in market value attributable to flights of the C-5A. As the court has previously noted, plaintiffs' sole expert on fair market value was thoroughly discredited to cross-examination. Further, during the same period that the C-5A allegedly began to fly, the market for real estate in the entire City of San Antonio was adversely affected by major changes in the federal tax code and devastation in the savings and loan industry which had the effect of eliminating credit. There was also a zoning change that affected at least some of the subject parcels. At least one witness testified that he was unable to use or sell his property after the zoning change. Therefore, even if plaintiffs had proven that aircraft flying over the subject parcels regularly intruded into protected airspace, there can be no finding of an additional

taking in the absence of evidence that the C-5A began flying frequently after July 15, 1982, substantially increased the burden on the subject parcels and resulted in a significant drop in market value.

CONCLUSION

For the foregoing reasons, the court finds that plaintiffs failed to prove that the United States took avigation easements over the subject properties after July 15, 1982. Defendant's motion to dismiss all claims in the above entitled case is granted, and the complaint is dismissesd with prejudice. Pursuant to RCFC 52(c), the court's findings of fact and conclusions of law are listed in the attached appendix.

IT IS SO ORDERED.

/s/ M R Tidwell

MOODY R. TIDWELL

Judge

APPENDIX

FINDINGS OF FACT

1. Kelly Air Force Base (KAFB) is located in Bexar County, Texas; it is approximately 7 miles from the geographic center of San Antonio.
2. KAFB is surrounded on three sides by the City of San Antonio; on the west side it is bounded by Lackland Air Force Base.
3. Camp Kelly was established in May 1917; it was renamed Kelly Field in July 1917.
4. In December 1917, Kelly was divided into two fields.
5. Pilot training, supply functions and warehouses were located at field No. 1; field No. 2 was used for flight instructor training.
6. In 1925, the Aviation Repair Depot was moved to Kelly No. 1, and the field was renamed Duncan field.
7. From 1925, Kelly Field and Duncan Field functioned separately.
8. In March 1943, the flight school was moved to Randolph Field, and Kelly and Duncan Fields were joined as Kelly Field.
9. In January 1948, Kelly Field was renamed Kelly Air Force Base.
10. The 2851st Air Base Group is the host organization at KAFB: its tenants include a number of organizations including the San Antonio Air Logistics Center (SAALC), the 149th Tactical Fighter Group and the 433d Tactical Airlift Wing.
11. During the 1970s, the United States Air Force adopted the Department of Defense Air Installation

Compatible Use Zone program designating lands at the end of active runways as being in clear zones or accident potential zones (APZs).

12. The clear zone is a 3000' by 3000' area adjacent to the center line of the runway.
13. APZ1s are located immediately adjacent to the clear zone. They are the same width as the clear zone, but are 5000' in length.
14. APZ2s are 3000' wide beginning at a distance of 8000' from the end of the runway and extending to a distance of 15,000' from the end of the runway.
15. All of the subject parcels are located, at least in part, in the Accident Potential Zones for runway 15/33.
16. The south APZs for runway 14/32 overlap the south APZs for runway 15/33.
17. From November 1972 through October 1973, there were at least fifty-two sorties per day from Kelly. Aircraft stationed at Kelly accounted for forty-five percent of the sorties; the remaining sorties were performed by transient aircraft.
18. The fleet of aircraft stationed at Kelly in October 1973 included the F-100, T-39, C-130, B-52, C-5A, F-106, T-30 and the F-5.
19. On or before 1975, the SAALC became the logistic support manager for the Military Aircraft Command's C-5A Galaxy jet transport fleet. The KAFB mission includes flight testing in conjunction with depot maintenance of the C-5As.
20. In 1979, the 149th Tactical Fighter Group converted from the F-100 aircraft to the F-4C aircraft.
21. From 1980 through 1986, the F-4C flew approximately ninety operations per day.
22. By 1981, noise levels for land surrounding KAFB were

175 percent greater than 1975 levels; this increase was attributable to the introduction of the F-4C in 1979.

23. In 1980, there were at least 444.34 opeerations per day or, assuming a five day week, 115,528.40 operations per year.

24. In 1983, there were at least 67,585 operations per year from Kelly.

25. Most aircraft operations at KAFB occur between the hours of 7:00 am and 10:00pm.

26. Because of prevailing winds, approximately 70-80 percent of the flights taking off and landing at KAFB occurred in a north to south direction.

27. From 1955 to 1986, there were two active runways at Kelly.

28. By 1980, runway 15/33 was used for approximately 80 percent of the operations at Kelly; runway 14/32 was used for approximately 20 percent of the operations.

29. KAFB is located in a non-congested area of San Antonio.

30. The parties stipulated to ownership of parcels A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, BB, DD, FF, GG, HH and II.

31. Parcel A is a 23.59 acre parcel tc the southeast of KAFB; it is located in APZ1 and APZ2 for runway 15/33.

32. Parcel A is owned by Clotilde Persyn, individually and as the independent executrix of the estate of Darson H. Persyn, who died on December 10, 1994.

33. Flights taking off from runway 15/33 fly over parcel A approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel A approximately 30 percent of the time.

34. Plaintiff Clotide Persyn and her husband Darson

Persyn (now deceased) moved onto parcel A on May 1, 1935 and continued to live on the property thereafter.

35. Parcel A is intersected by the Laredo Highway. There is a house and barn on the south side of the Laredo highway; the Persyns used the land for farming until Darson Persyn became sick.

36. After Mr. Persyn became sick, the Persyns rented the land to an unidentified person who uses the land for irrigation and farming.

37. In 1980, noise levels on parcel A ranged from 75-80 DNL.

38. By 1981, parcel A did not have a highest and best use as residential property.

39. High noise levels did not substantially interfere with the agricultural use of parcel A.

40. Noise levels over parcel A did not substantially increase after July 15, 1982.

41. The number of actual flights by jet aircraft over parcel A in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

42. Parcel B is part of a 19.433 acre tract located southeast of KAFB; 3.185 acres are located in the southwesternmost corner of APZ2.

43. Flights taking off from runway 15/33 fly over parcel B approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel B approximately 30 percent of the time.

44. Plaintiffs Florent and Mildred V. Baecke moved onto the parcel that included parcel B in 1952; in 1952 they owned the house and the acreage upon which it rested (approximately ½ acre), and Mr. Baecke's parents owned the remainder of parcel B.

45. In 1971, the Federal Housing Administration refused to finance the sale of parcel B because of high noise levels.
46. In 1980, noise levels on parcel B ranged from 70-75 DNL.
47. By 1981, parcel B did not have a highest and best use as residential property.
48. Noise levels over parcel B did not substantially increase after July 15, 1982.
49. The number of actual flights by jet aircraft over parcel B in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
50. In 1985, Mr. Baecke inherited parcel B from his parents.
51. Parcel C is part of a 39.261 acre tract located southeast of KAFB; 25:415 acres of the tract are located in APZ2.
52. Flights taking off from runway 15/33 fly over parcel C approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel C approximately 30 percent of the time.
53. Parcel C is currently owned by plaintiffs Paul and Erma Persyn.
54. In 1980, noise levels on parcel C ranged from 70-75 DNL.
55. By 1981, parcel C did not have a highest and best use as residential property.
56. Noise levels over parcel C did not substantially increase after July 15, 1982.
57. The number of actual flights by jet aircraft over parcel C in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
58. Parcel D is part of a 46.904 acre parcel to the southeast of KAFB; 43.308 acres are located in APZ2.

59. Flights taking off from runway 15/33 fly over parcel D approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel D approximately 30 percent of the time.

60, Parcel D is curently owned by plaintiff Raul Jimenez, Sr.

61. In 1980, noise levels on parcel D ranged from 70-75 DNL.

62. By 1981, parcel D did not have a highest and best use as residential property.

63. Noise levels over parcel D did not substantially increase after July 15, 1982.

64. The number of actual flights by jet aircraft over parcel D in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

65. Parcel E is a 1.507 acre parcel to the southeast of KAFB; it is located in APZ2.

66. Flights taking off from runway 15/33 fly over parcel E approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel E approximately 30 percent of the time.

67. Parcel E is currently owned by plaintiffs Aviel and Josie A. Broekhove.

68. In 1980, noise levels on parcel E ranged from 70-75 DNL.

69. By 1981, parcel E did not have a highest and best use as residential property.

70. Noise levels over parcel E did not substantially increase after July 15, 1982.

71. The number of actual flights by jet aircraft over parcel E in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

72. Parcel F is part of a 19.497 acre tract located southeast

of KAFB; 11.465 acres are located in APZ2.

73. Flights taking off from runway 15/33 fly over parcel F approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel F approximately 30 percent of the time.

74. Parcel F is currently owned by Richard Persyn and Celeste Worrick.

75. In 1980, noise levels on parcel F ranged from 70-80 DNL.

76. By 1981, parcel F did not have a highest and best use as residential property.

77. Noise levels over parcel F did not substantially increase after July 15, 1982.

78. The number of actual flights by jet aircraft over parcel F in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

79. Paracel G is a 6.814 acre parcel to the southeast of KAFB; it is located in APZ2.

80. Flights taking off from runway 15/33 fly over parcel G approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel G approximately 30 percent of the time.

81. Gabriel Thienpont, Emma Persyn, Mary Rosenbush and Margaret Milam jointly owned parcel G until December 28, 1992.

82. On February 1, 1994, the court allowed plaintiffs' motion to substitute Frank Persyn, Henry Joe Persyn, Leslie Ann Persyn, Lorraine Steubing and Laura Persyn as successors to Emma Persyn, Dec'd.

83. In 1980, noise levels on parcel G ranged from 70-80 DNL.

84. By 1981, parcel G did not have a highest and best use as residential property.

85. Noise levels over parcel G did not substantially increase after July 15, 1982.
86. The number of actual flights by jet aircraft over parcel G in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
87. Parcel H is a 1.322 acre parcel to the southeast of KAFB; it is located in APZ2.
88. Flights taking off from runway 15/33 fly over parcel H approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel H approximately 30 percent of the time.
89. Parcel H is curently owned by Hortense Broekhove.
90. In 1980, noise levels on parcel H ranged from 75-80 DNL.
91. By 1981, parcel H did not have a highest and best use as residential propery.
92. Noise levels over parcel H did not substantially increase after July 15, 1982.
93. The number of actual flights by jet aircraft over parcel H in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
94. Parcel I is a 1.184 acre parcel to the southeast of KAFB; it is located in APZ2 adjacent to parcel E.
95. Flights taking off from runway 15/33 fly over parcel I approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel I approximately 30 percent of the time.
96. Parcel I is currently owned by Hortense Brockhove.
97. In 1980, noise levels on parcel I ranged from 70-75 DNL.
98. By 1981, parcel I did not have a highest and best use as residential property.
99. Noise levels over parcel I did not substantially

increase after July 15, 1982.

100. The number of actual flights by jet aircraft over parcel I in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

101. Parcel J is a 15.874 acre parcel located to the southeast of KAFB; it is located in APZ2.

102. Flights taking off from runway 15/33 fly over parcel J approximately 30 percent of the time.

103. In 1980, noise levels on parcel J ranged from 70-80 DNL.

104. Noise levels over parcel J did not substantially increase after July 15, 1982.

105. The number of actual flights by jet aircraft over parcel J in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

106. Parcel J was purchased by 4M Properties for approximately $396,000 in October 1984.

107. At the time of purchase, 4M properties was aware that aircraft taking off and landing at KAFB would fly over parcel J.

108. At the time of purchase, the highest and best use for property J was for light industrial/commercial enterprise.

109. Overflights of aircraft from KAFB did not substantially interfere with the highest and best use of parcel J after 1984.

110. Parcel K is part of a 8.79 acre parcel located to the southeast of KAFB; 8.099 acres are located in APZ2 adjacent to parcel J.

111. Flights taking off from runway 15/33 fly over parcel K approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel K approximately 30 percent of the time.

112. Parcel K was purchased by Terry Britton in partnership with Somerset Joint Venture for approximately $196,000 in February 1985.

113. At the time of purchase, Somerset Joint Venture was aware that aircraft taking off and landing at KAFB would fly over parcel K.

114. At the time of purchase, the highest and best use for property K was for light industrial/commercial enterprise.

115 Overflights of aircraft from KAFB did not substantially interfere with the highest and best use of parcel K after 1984.

116. In 1980, noise levels on parcel K ranged from 70-80 DNL.

117. Noise levels over parcel K did not substantially increase after July 15, 1982.

118. The number of actual flights by jet aircraft over parcel K in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

119. Parcel L is part of a 24.565 acre parcel to the southeast of KAFB; 11.781 acres are located in APZ2.

120. Flights taking off from runway 15/33 fly over parcel L approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel L approximately 30 percent of the time.

121. Parcel L. is jointly owned by Aviel L. Broekhove, Phil M. Broekhove and Emiel P. Broekhove.

122. In 1980, noise levels on parcel L ranged from 70-80 DNL.

123. By 1981, parcel L did not have a highest and best use as residential property.

124. Noise levels over parcel L did not substantially increase after July 15, 1982.

125. The number of actual flights by jet aircraft over parcel L in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
126. parcel M is part of a 24.67 acre parcel located southeast of KAFB; 13.757 acres are located in APZ2.
127. Flights taking off from runway 15/33 fly over parcel M approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel M approximately 30 percent of the time.
128. Parcel M was jointly owned by Remi Aelvoet, Marshall Aelvoet, Richard Aelvoet, Erma Persyn and Elsie Aelvoet Verelst until February 1, 1992.
129. Remi Aelvoet died on February 1, 1992.
130. On February 1, 1994, the court allowed plaintffs' motion to substitute Marie Aelvoet as the devises of Remi Aelvoet.
131. In 1980, noise levels on parcel M ranged from 70-80 DNL.
132. By 1981, parcel M did not have a highest and best use as residential property.
133. Noise levels over parcel M did not substantially increase after July 15, 1982.
134. The number of actual flights by jet aircraft over parcel M in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
135. Parcel N is part of a 24.17 acre parcel located southeast of KAFB; 14.794 acres are located in APZ2.
136. Flights taking off from runway 15/33 fly over parcel N approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel N approximately 30 percent of the time.
137. Raymond Wauters inherited Parcel N upon the death of his mother on February 21, 1992.

138. In 1980, noise levels on parcel N ranged from 70-80 DNL.
139. By 1981, parcel N did not have a highest and best use as residential property.
140. Noise levels over parcel N did not substantially increase after July 15, 1982.
141. The number of actual flights by jet aircraft over parcel N in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
142. Parcel O is .500 acres southeast of KAFB; it is located in APZ2.
143. Flights taking off from runway 15/33 fly over parcel O approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel O approximately 30 percent of the time.
144. Parcel O is owned by Raymond and Lorraine Wauters.
145. In 1980, noise levels on parcel O ranged from 75-80 DNL.
146. By 1981, parcel O did not have a highest and best use as residential property.
147. Noise levels over parcel O did not substantially increase after July 15, 1982.
148. The number of actual flights by jet aircraft over parcel O in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
149. Parcel P is part of a 32.85 acre tract located southeast of KAFB; 23.010 acres are located in APZ2.
150. Flights taking off from runway 15/33 fly over parcel P approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel P approximately 30 percent of the time.
151. Parcel P is owned by Irma Verstuyft.
152. In 1980, noise levels on parcel P ranged from 70-80

DNL; most of the land had sound levels greater than 75 DNL.

153. By 1981, parcel P did not have a highest and best use as residential property.

154. Noise levels over parcel P did not substantially increase after July 15, 1982.

155. The number of actual flights by jet aircraft over parcel P in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

156. Parcel Q is part of a 50.503 acre tract located southeast of KAFB; 26.908 acres are located in APZ2.

157. Flights taking off from runway 15/33 fly over parcel Q approximately 30 percent of the time.

158. Parcel Q was jointly owned by Raymond Verstuyft and Robert and Eunice Verstuyft until September 10, 1989.

159. Raymond Verstuyft died on September 10, 1989.

160. Robert Verstuyft died on May 28, 1990.

161. On February 1, 1994, the court allowed plaintiffs motion to substitute Eunice Verstuyft for the interest of Robert Verstuyft, Dec'd, and Michael Raymond Verstuyft, Gary E. Verstuyft and Shirley P. Verstuyft for the interest of Raymond Verstuyft, Dec'd.

162. In 1980, noise levels on parcel Q ranged from 70-80 DNL; most of the land had sound levels greater than 75 DNL.

163. By 1981, parcel Q did not have a highest and best use as residential property.

164. Noise levels over parcel Q did not substantially increase after July 15, 1982.

165. The number of actual flights by jet aircraft over parcel Q in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

166. Parcel R is part of a 25.47 acre tract located southeast of KAFB; 18.600 acres are located in APZ2.
167. Flights taking off from runway 15/33 fly over parcel R approximately 30 percent of the time.
168. Parcel R is owned by Margaret Verstuyft, Edward C. Verstuyft, John D. Verstuyft and Marie Durst.
169. In 1980, noise levels on parcel R ranged from 70-80 DNL: most of the land had sound levels greater than 75 DNL.
170. By 1981, parcel R did not have a highest and best use as residential property.
171. Noise levels over parcel R did not substantially increase after July 15, 1982.
172. The number of actual flights by jet aircraft over parcel R in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
173. Parcel S is a 1.187 acre tract located southeast of KAFB in APZ2; it is currently owned by Roger and Patricia Verstuyft.
174. Flights taking off from runway 15/33 fly over parcel S approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel S approximtely 30 percent of the time.
175. Flights taking off from runway 15/33 fly over parcel S approximately 70 percent percent of the time; flights landing on runway 15/33 fly over parcel S approximately 30 percent of the time.
176. In 1980, noise levels on parcel S ranged from 75-80 DNL.
177. By 1981, parcel S did not have a highest and best use as residential property.
178. Noise levels over parcel S did not substantially increase after July 15, 1982.

179. The number of actual flights by jet aicraft over parcel S in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
180. Parcel T is a 18.720 acre tract located southeast of KAFB in APZ2.
181. Flights taking off from runway 15/33 fly over parcel T approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel T approximately 30 percent of the time.
182. Parcel T was owned by Irma Verstuyft and George Verstuyft until September 26, 1990.
183. George Verstsuyft died on September 26, 1990.
184. On February 1, 1994, the court allowed plaintiffs' motion to substitute Roger Verstkuyft, Marvin G. Verstuyft and Sharon E. Eisenhauer for the interest of George Verstuyft in parcel T.
185. In 1980, noise levels on parcel T ranged from 70-80 DNL; most of the land had sound levels greater than DNL.
186. By 1981, parcel T did not have a highest and best use as residential property.
187. Noise levels over parcel T did not substantially increase after July 15, 1982.
188. The number of actual flights by jet aircraft over parcel T in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
189. Parcel U is part of a 24.283 acre tract located southeast of KAFB; 20.317 acres are located in APZ2.
190. Flights taking off from runway 15/33 fly over parcel U approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel U approximately 30 percent of the time.
191. Parcel U was owned by Irma Verstuyft and George

Verstuyft until September 26, 1990.

192. On February 1, 1994, the court allowed plaintiffs' motion to substitute Roger Verstuyft, Marvin G. Verstuyft and Sharon E. Eisenhauer for the interest of George Verstuyft in parcel U.

193. In 1980, noise levels on parcel U ranged from 70-80 DNL; most of the land had sound levels greater than 75 DNL.

194. By 1981, parcel U did not have a highest and best use as residential property.

195. Noise levels over parcel U did not substantially increase after July 15, 1982.

196. The number of actual flights by jet aircraft over parcel U in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

197. Parcel V part of a 26.147 acre tract located southeast of KAFB; 19.373 acres are in APZ1 and APZ2.

198. Flights taking off from runway 15/33 fly over parcel V approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel V approximately 30 percent of the time.

199. parcel V was owned by Clara Verschelden, Mildred V. Baecke and Alene Buys until April 15, 1992.

200. Clara Verschelden died on April 15, 1992.

201. The current owners of parcel V are Mildred V. Baecke and Alene Buys.

202. Mildred Baecke lived on parcel V until 1952.

203. In 1980, noise levels on parcel V ranged from 70-80 DNL; most of the land had sound levels greater that 75 DNL.

204. By 1981, parcel V did not have a highest and best use as residential property.

205. Noise levels over parcel V did not substantially

increase after July 15, 1982.

206. The number of actual flights by jet aircraft over parcel V in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

207. Parcel W is a 24.89 acre parcel located southeast of KAFB in APZ1 and APZ2; it is owned by Clara Verstuyft Persyn.

208. Flights taking off from runway 15/33 fly over parcel W approximately 30 percent of the time.

209. In 1980, noise levels on parcel W ranged from 75-80 DNL.

210. By 1981, parcel W did not have a highest and best use as residential property.

211. Noise levels over parcel W did not substantially increase after July 15, 1982.

212. The number of actual flights by jet aircraft over parcel W in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

213. Parcel X is a 21.368 parcel located southeast of KAFB in APZ1 and APZ2; it is owned by Irma Verstuyft.

214. Flights taking off from runway 15/33 fly over parcel X approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel X approximately 30 percent of the time.

215. In 1980, noise levels on parcel X ranged from 75-80 DNL.

216. By 1981, parcel X did not have a highest and best use as residential property.

217. Noise levels over parcel X did not substantially increase after July 15, 1982.

218. The number of actual flights by jet aircraft over parcel X in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

219. Parcel Y is a 1.00 acre parcel located southeast of KAFB in APZ1; at trial plaintiffs did not establish ownership of this parcel or standing to sue.

220. Flights taking off from runway 15/33 fly over parcel Y approximately 70 percent of the time; flights landing on runway 15/33 over parcel Y approximately 30 percent of the time.

221. Parcel Y has been used as a water hole for parcels A, X, W and Z at all times relevant to this litigation.

222. In 1980, noise levels on parcel Y ranged from 75-80 DNL.

223. By 1981, parcel Y did not have a highest and best use as residential property.

224. Overflights from KAFB have not substantially interfered with the use of parcel Y as a water hole.

225. Noise levels over parcel Y did not substantially increase after July 15, 1982.

226. The number of actual flights by jet aircraft over parcel Y in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

227. Parcel Z consist of 22.064 acres, intersected by the Laredo Highway, southeast of KAFB in APZ1 and APZ2.

228. Parcel Z is owned by Henry Verstuyft and Juliana Verstuyft.

229. Flights taking off from runway 15/33 fly over parcel Z approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel Z approximately 30 percent of the time.

230. In 1980, noise levels on parcel Z ranged from 75-80 DNL.

231. By 1981, parcel Z did not have a highest and best use as residential property.

232. Noise levels over parcel Z did not substantially increase after July 15, 1982.

233. The number of actual flights by jet aircraft over parcel Z in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

234. Parcel AA consists of 23.059 acres located southeast of KAFB in APZ1 and APZ2; the parties did not stipulate to ownership of this parcel and there was no evidence on this issue at trial.

235. Flights taking off from runway 15/33 fly over parcel AA approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel AA approximately 30 percent of the time.

236. In 1980, noise levels on parcel AA ranged from 75-80 DNL.

237. By 1981, parcel AA did not have a highest and best use as residential property.

238. Noise levels over parcel AA did not substantially increase after July 15, 1982.

239. The number of actual flights by jet aircraft over parcel AA in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

240. Parcel BB is a 4.358 acre tract located southeast of KAFB in APZ1.

241. Flights taking off from runway 15/33 fly over parcel BB approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel BB approximately 30 percent of the time.

242. Flights taking off from runway 15/33 fly over parcel BB approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel BB approximately 30 percent of the time.

243. In 1980, noise levels on parcel BB ranged from 75-80 DNL.

244. By 1981, parcel BB did not have a highest and best use as residential property.

245. Noise levels over parcel BB did not substantially increase after July 15, 1982.

246. The number of actual flights by jet aircraft over parcel BB in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

247. A.C. Lopez obtained title to parcel BB by warranty deed dated June 7, 1984.

248. At the time Mr. Lopez obtained titled, parcel BB was subject to a flight easement recorded in Volume 4061, page 501 Deed Records of Bexar County, Texas; there was no evidence in the record regarding the extent of this easement.

249. Parcel CC is a 4.00 acre parcel located southeast of KAFB in APZ1; the parties did not stipulate to ownership of this parcel and there was no evidence on this issue at trial.

250. Flights taking off from runway 15/33 fly over parcel CC approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel CC approximately 30 percent of the time.

251. In 1980, noise levels on parcel CC ranged from 75-80 DNL.

252. By 1981, parcel CC did not have a highest and best use as residential prperty.

253. Noise levels over parcel CC did not substantially increase after July 15, 1982.

254. The number of actual flights by jet aircraft over parcel CC in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

255. Parcel DD is a .201 acre parcel located southeast of KAFB in APZ1 south; it is owned by Helaman R. Duran and Irene L. Duran.

256. Flights taking off from runway 15/33 fly over parcel DD approximately 70 percent of the time; flights landing on runway 15/33 fly over parcel DD approximately 30 percent of the time.
257. In 1980, noise levels on parcel DD were above 80 DNL.
258. By 1981, parcel DD did not have a highest and best use as residential property.
259. Noise levels over parcel DD did not substantially increase after July 15, 1982.
260. The number of actual flights by jet aircraft over parcel DD in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
261. Parcel FF is part of a 17.180 acre tract located northwest of KAFB; the easternmost 8.923 acres are located in APZ1 north.
262. Flights taking off from runway 15/33 fly over parcel FF approximately 30 percent of the time; flights landing on runway 15/33 fly over parcel FF approximately 70 percent of the time.
263. Parcel FF is owned by the estates of Joe Centeno, Sr., Dec'd, and Jesusa Centeno, Dec'd.
264. In 1980, noise levels on parcel FF ranged from 75-80 DNL.
265. By 1981, parcel FF did not have a highest and best use as residential property.
266. Noise levels over parcel FF did not substantially increase after July 15, 1982.
267. The number of actual flights by jet aircraft over parcel FF in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.
268. Parcel GG is part of a 35.17 acre tract northwest of KAFB; 31.373 acres are located in APZ2 north.
269. Flights taking off from runway 15/33 fly over parcel

GG approximately 30 percent of the time; flights landing on runway 15/33 fly over parcel GG approximately 70 percent of the time.

270. Parcel GG is jointly owned by Margaret Thienpont, Aline Oyer and Marie Decock.

271. In 1980, noise levels on parcel GG ranged from 70-80 DNL.

272. By 1981, parcel GG did not have a highest and best use as residential property.

273. Noise levels over parcel GG did not substantially increase after July 15, 1982.

274. The number of actual flights by jet aircraft over parcel GG in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

275. Parcel HH is part of a 48.123 acre parcel located northwest of KAFB; 43.352 acres are located in APZ2 north.

276. Flights taking off from runway 15/33 fly over parcel HH approximately 30 percent of the time; flights landing on runway 15/33 fly over parcel HH approximately 70 percent of the time.

277. Plaintiff Terry Britton purchased parcel HH on or about 1980 for a price of approximately $6,500/acre.

278. In 1980, noise levels on parcel HH ranged from 70-80 DNL.

279. Noise levels over parcel HH did not substantially increase after July 15, 1982.

280. The number of actual flights by jet aircraft over parcel HH in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

281. In 1984, Robert Cadena, John Miller and Comcal Group purchased tract HH for a price of approximately $.68 per square foot.

282. In March 1985, the Mexican American Unity Council, Inc. obtained an option to purchase tract HH; the option expired if not executed by October 31, 1995.

283. Under the terms of the option the buyer had the right to cancel the option at any time during its term in the event the property did "not prove satisfactory for Buyer's intended use, in Buyer's sole discretion and opinion."

284. The Mexican American Unity Council, Inc. did not exercise its option to purchase tract HH.

285. Overflights of aircraft from KAFB did not substantially interfere with the use and enjoyment of parcel HH for industrial purposes after 1984.

286. Parcel II consists of 5.477 acres located southeast of KAFB in APZ2 south.

287. Parcel II is jointly owned by J.L. Guerra, Jr., Independent Executor of the Estate of J.L. Guerra, Sr., Dec'd, and Herminia L. Guerra.

288. In 1980, noise levels on parcel II ranged from 70-75 DNL.

289. By 1981, parcel II did not have a highest and best use as residential property.

290. Noise levels over parcel II did not substantially increase after July 15, 1982.

291. The number of actual flights by jet aircraft over parcael II in 1980 was greater than the actual flights in 1983 or the projected flights after 1986.

CONCLUSIONS OF LAW

Upon these findings of fact, which are made part of this judgment, the court concludes that plaintiffs are not entitled to recover for the taking of avigation easements over the subject properties and their claims are dismissed.

Supreme Court, U.S.
FILED

NO. 961554 MAR 27 1997

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

DARSON H. PERSYN, CLOTILDE PERSYN,
FLORENT BAECKE, MILDRED V. BAECKE, ET AL

Petitioners

v.

THE UNITED STATES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX VOLUME II
Appendix D, E, F, G, ,H, I, J

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Attorney for Petitioners
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18 pp

APPENDIX D

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

96-5033

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN, GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, J.C. LOPEZ, MARGARET G. BROWN, HELAMAN R. DURAN, IRENE L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA,

CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd. Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES CALDANA, CARMEN GARCIA and ROLAND NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR. Ind. Exec. of Est. of J.L. GUERRA, SR. Dec'd.,

Appeal from a Judgment of the United States Court of Federal Claims in 91-1535L entered September 27, 1995, Judge Moody R. Tidwell.

JUDGMENT

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly

Jan Horbaly, Clerk

DATED: DECEMBER 27, 1996

ISSUED AS A MANDATE: February 18, 1997

COSTS: Against, Appellants.

PRINTING.....$175.25

TOTAL.....$175.25

APPENDIX E

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

96-5033

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN,GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, A.C. LOPEZ, MARGARET G. BROWN,

HELAMAN R. DURAN, IREME L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA, CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd. Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES CALDANA, CARMEN GARCIA and ROLAND

NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR, Ind. Exec of Est. of J.L. GUERRA, SR. Dec'd.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 27, 1996

Before ARCHER, *Chief Judge.* NEWMAN and MICHEL, *Circuit Judges.*
MICHEL, *Circuit Judge.*

Persyn, et al., appeal the orders of the Court of Federal Claims: (1) holding that the Court of Federal Claims had jurisdiction and denying Persyn's motion to "remand"[1] to the United States District Court for the Western District of Texas.

Persyn v. United States, No. 91-1535L (Court of Federal Claims, filed Jan. 4, 1995); (2) granting partial summary judgment to the United States ("government") dismissing Persyn's claim for a regulatory taking, *Persyn v. United States,*

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[1] The plaintiffs moved for "remand" to the district court, but the Court of Federal Claims properly treated the motion as one for transfer. It is the denial of the transfer which we affirm.

32 Fed. Cl. 579 (1995) ("Persyn I"); and (3) granting the government's motion for Judgment on Partial Findings and dismissing the complaint, *Persyn v. United States,* 34 Fed. Cl. 187 (1995) ("*Persyn II*"). The appeal was submitted for our decision following oral argument on November 13, 1996. Because we agree that the appellants' takings claims are time barred, and also agree with the dismissal of apellants' other claims, we *affirm.*

BACKGROUND

The facts of this case are set out in detail in *Persyn II,* 34 Fed. Cl. at 190-191. In short, appellants are the owners of 35 tracts of land adjacent to or near the Kelly Air Force Base ("Kelly AFB") in San Antonio, Texas. Kelly AFB has been in continuous operation as an Air Force base since 1917. Persyn sued the United States seeking over $16 million in damages, alleging physical takings under the Fifth Amendment of their properties resulting from overflights of the government's aircraft. They also asserted regulatory takings of their property through the promulgation of Department of Housing and Urban Development ("HUD") regulations and through the passage of related zoning and land-use ordinances by the City of San Antonio.

The government was granted partial summary judgdment on some of the issues. After a three day trial on the remaining physical takings issue, including arguments and evidence regarding the statute of limitations, the Court of Federal Claims issued an order with opinion granting judgment on partial findings in favor of the United States. The court held that the claims were time barred and rejected Persyn's argument that noise level from overflights must "stabilize" before any cause of action accrues.

DISCUSSION

1.

Appellants claim avigation easements by physical taking from overflights of aircraft into and out of Kelly AFB. An overflight avigation easement taking is established by proof of three elements: (1) the aircraft flights must be directly over the property; (2) the flights must be low and frequent; and (3) the flights must substantially interfere with the use and enjoyment of the property. *United States v. Causby,* 328 U.S. 256, 266 (1946); *A.J. Hodges Indus., Inc. v. United States,* 355 F.2d 592, 595 (Ct. Cl. 1966). Furthermore, a claim must be brought in a timely fashion: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). Appellants filed their claim July 15, 1988. The critical date for statute of limitation purposes is therefore July 15, 1982.

The government argued below, and the trial court held, that appellants' causes of action accrued prior to 1982 and thus their claims were barred. Appellants argue that the trial court erred because the causes of action did not accrue until the interference had "stabilized." They cite *Applegate v. United States* 25 F.3d 1579 (Fed. Cir. 1994), in support of this argument. In *Applegate,* this court decided that the cause of action for a taking via a gradual erosion of land did not accrue until it was clear how much erosion would take place—that is, until the erosion had stabilized. In reaching its decision, the *Applegate* court relied on *United States v. Dickinson*, 331 U.S. 745 (1947). *Dickinson* involved the building of

a dam which caused intermittent flooding of the plaintiffs' land. 331 U.S. at 746-47. The Supreme Court held that the plaintiffs could delay filing suit until the full extent of the damage was clear. *Id.* at 749. The policy in *Applegate, Dickinson,* and other "stabilization" cases is to avoid piecemeal litigation and the res judicata risks to plaintiffs attendant to piecemeal litigation. The *Dickinson* stabilization doctrine has been applied in the avigation easement context. *Avery v. United States,* 330 F.2d 640, 643 (Ct. cl. 1964) (holding that a "new and further taking" had occurred when "greater noise, greater inconvenience and a further reduction of land values' were caused by increased operations and new aircraft introductions."); *Aaron v. United States,* 311 F.2d 798, 800-01 (Ct. Cl. 1963) ("Before that time [that the Air Force started making test flights, the plaintiffs] were uncertain just how serious the impairment would be or how long it would continue. Before that time we do not think the statute of limitations had begun to run . . . ."); *Klein v. United States,* 152 Ct. Cl. 221, 223-24 (1960) ("where at the outset it was not known to what extent the jet planes would pass over the property and, hence, whether or not the condition would become intolerable, plaintiffs' cause of action had not fully accrued and did not fully accrue until such conditions had come to pass or the extent of the use and the consequent interference with plaintiffs' use and enjoyment of their property was known or ascertainable").

Apellants argue that their causes of action accrued well after the 1982 critical date because noise levels did not stabilize until 1985. However, the law is clear that stabilization of the noise level is not dispositive. Rather, the dispositive issue is when the noise level reached an intolerable level and resulted in a taking. We agree with the

Court of Federal Claims that the general principle of *Dickinson* applies: "a claim for taking based on continuing acts of physical invasion does not accrue until the extent of the invasion and the degree of the interference is known or should be known." *Persyn II,* 34 Fed. Cl. at 197 (citing *Aaron,* 311 F.2d at 801). We further agree with the trial court that "the extent of the invasion and the degree of interference is ascertainable when the United States *begins* to operate its aircraft at low elevation and with such frequency that they substantially interfere with the use and enjoyment of the land, with the intent to continue such flights indefinitely." *Id.* (citing *A.J. Hodges,* 355 F.2d at 596).

After trial, the Court of Federal Claims found that there was substantial interference with the use and enjoyment of each of the parcels before 1981. Based on the evidence adduced at trial, we cannot hold that this finding was clearly erroneous. Since the causes of action accrued before the critical date, appellants' claims are time barred.

II.

We have carefully considered appellants' arguments regarding jurisdiction, the application of Texas law, and regulatory takings, and we affirm the rulings of the trial court for the reasons set forth in the trial court's orders.

APPENDIX E

(28 U.S.C., Jurisdiction, Court of Federal Claims)

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

APPENDIX F

(32 CFR Part 256, "Air Installation Compatible Use Zones," Department of Defense)

§256.4 Policy.

(a) *General.* As a first priority step, all reasonable, economical, and practical measures will be taken to reduce and/or control the generation of noise from flying and flying related activities. Typical measures normally include siting of engine test and runup facilities in remote areas if practical, provision of sound suppression equipment where necessary, and may include additional measures such as adjustment of traffic patterns to avoid built-up areas where such can be accomplished with safety and without significant impairment of operational effectiveness. After all reasonable noise source control measures have been taken, there will usually remain significant land areas wherein the total noise exposure is such as to be incompatible with certain uses.

(b) *Compatible use land*—(1) *General.* (1) DoD policy is to work toward achieving compatibility between air installations and neighboring Civilian communities by means of a compatible land use planning and control process conducted by the local community.

(2) *Property rights acquisition*—(1) *General.* While noise generated by aircraft at military air installations should be an integral element of land use compatibility efforts, the acquisition of property rights on the basis of noise by the Department of Defense may not be in the long term best

interests of the United States. Therefore, while the complete requirement for individual installations should be defined prior to any programming actions, acquisition of interests should be programmed in accordance with the following priorities.

(A) *Priorities.* (A) The first priority is the acquisition in fee and/or appropriate restrictive easements of lands within the clear zones whenever practicable.

(B) Outside the clear zone, program for the acquisition of interests, first in Accident Potential Zones and secondly in high noise areas only when all posibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened. if programming actions are considered necessary, complete records of all discussions, negotiations, testimony, etc. with or before all local officials, boards, etc. must be maintained. This will ensure that documentation is available to indicate that all reasonable and prudent efforts were made to preclude incompatible land use through cooperation with local governmental officials and that all recourse to such action has been exhausted. Such records shall accompany programming actions and/or apportionment requests for items programmed prior to the date of this part. In action, a complete economic analysis and assessment of the future of the installation must be included.

APPENDIX G

(24 CFR Part D, "Environmental Criteria and Standards" Department of Housing and Urban Development)

Subpart D—Siting of HUD Assisted Projects in Runway Clear Zones of Civil Accident Potential Zones at Military Airfields.

Source: 49 FR 880. Jan. 6, 1984, unless otherwise noted.

§51.300 Purpose.

(a) The Department of Housing and Urban Development finds that HUD assisted or insured projects and their occupants in Runway Clear Zones, Clear Zones and Accident potential Zones are exposed to a significant risk of personal injury or property damage from aircraft accidents.

(b) It is the purpose of this subpart to promote compatible land uses around civil airports and military airfields by identifying suitable land uses for Runway Clear Zones at civil airports and Clear Zones and Accident Potential Zones at military airfields and by establishing them as standards for providing HUD assistance, subsidy or Insurance.

§51.303 General Policy.

It is HUD's general policy to apply standards to prevent incompatible development around civil airports and military airfields.

(a) HUD policy for actions in Runway Clear Zones and Clear Zones.

(1) HUD policy is not to provide any assistance,

subsidy or insurance for projects and actions covered by this part except as stated in §51.303(a)(2) below.

(2)If a project proposed for HUD assistance, subsidy or insurance is one which will not be frequently used or occupied by people. HUD policy is to provide assistance, subsidy or insurance only when written assurances are provided to HUD by the airport operator to the effect that there are no plans to purchase the land involved with such facilities as part of a Runway Clear Zone or Clear Zone acquisition program.

(3) Special notification requirements for Runway Clear Zones and Clear Zones. In all cases involving HUD assistance, subsidy, or insurance for the purchase or sale of an existing property in a Runway Clear Zoneor Clear Zone. HUD (or the Grant Recipient under title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5301 *et seq.*) shall advise the buyer that the property is in a Runway Clear Zone or Clear Zone, what the implications of such a location are, and that there is a possibility that the property may, at a later date, be acquired by the airport operator. The buyer must sign a statement acknowledging receipt of this information.

(b) HUD policy for action in Accident Potential Zones at Military Airfields. HUD policy is to discourage the provision of any assistance, subsidy or insurance for projects and action in the Accident Potential Zones. To be approved, projects must be generally consistent with the recommendations in the *Land Use Compatibility Guidelines For Accident Potential Zones* chart contained in DOD Instruction 4165.57, 32 CFR part 256.

APPENDIX H

(28 U.S.C. § 1346, Jurisdiction, District Court)

(f) The district courts shall have exclusive original jurisdiction of civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX I

(28 U.S.C., Rules of Decision Act)

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, c. 646, 62 Stat. 944.)

APPENDIX J

(U.S. Const., Amend. 5, Taking Clause)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.